Supreme Court, U.S.
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In The
Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

PATRICIA JOHNSON and MICHAEL AU FRANCE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Is the temporary civil exclusion of a lawfully arrested or convicted individual from a high drug crime neighborhood for the purpose of addressing compelling government interests subject to rational basis review, the Fourth Amendment's proscription against unreasonable seizures, some other form of intermediate judicial scrutiny, or strict judicial scrutiny?

2) Does a lawfully arrested or convicted individual have a constitutionally protected association interest in visiting grandchildren or a lawyer? Is an association interest unconstitutionally limited by the temporary civil exclusion of a lawfully arrested or convicted individual from a high drug crime neighborhood for the purpose of addressing a compelling government interest?

3) Does a municipality satisfy strict scrutiny in defending a drug exclusion zone ordinance by proving a compelling government interest, proving that almost one fifth of the municipality's drug crimes occur in one neighborhood, proving recidivism of individuals arrested or convicted of drug crimes, proving the failure of other techniques to curb drug crime, and proving that a similar ordinance succeeded in another municipality?

4) Is the temporary civil exclusion of an individual lawfully convicted of a specified drug crime from a high drug crime neighborhood a criminal penalty within the meaning of the constitutional right to be free from double jeopardy?

5) Does the federal judiciary have jurisdiction to facially invalidate a municipal ordinance challenged on the ground that the ordinance unconstitutionally limits alleged freedom of movement and freedom of intimate association?

LIST OF PARTIES

Petitioner: City of Cincinnati, Ohio

Respondents: Patricia Johnson and Michael Au France

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PETITION FOR WRIT OF CERTIORARI

Petitioner, City of Cincinnati, respectfully prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the United States District Court, Southern District of Ohio, Western Division, issued on January 20, 2000, 119 F. Supp. 2d 735, held that Chapter 755, Cincinnati Municipal Code, Drug Exclusion Zones, was unconstitutional as applied and on its face. App. 71-102. The 2-1 Opinion of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the District Court, was issued on September 26, 2002. App. 1-70; 310 F.3d 484. The order of the United States Court of Appeals for the Sixth Circuit denying the City's Petition for Rehearing En Banc was issued on January 2, 2003. App. 103-04; 2002 U.S. App. LEXIS 363.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 to review the order of the United States Court of Appeals for the Sixth Circuit denying the City's Petition for Rehearing En Banc on January 2, 2003, and the 2-1 Opinion of the Court of Appeals issued on September 26, 2002.

STATUTORY PROVISIONS INVOLVED

Ordinance No. 229-1996 (the municipal legislation declared unconstitutional by the 2-1 Order of the United States Court of Appeals for the Sixth Circuit – Cincinnati Municipal Code, Chapter 755, Drug Exclusion Zones) and Ordinance No. 304-1998 (a 1998 amendment to Chapter 755). App. 105-129.

STATEMENT OF THE CASE

In 1996, confronted with rampant drug crime in certain neighborhoods and intending to restore a higher quality of life to those neighborhoods for residents and businesses, the City Council of the City of Cincinnati enacted Ordinance No. 229-1996, codified as Chapter 755, Cincinnati Municipal Code, Drug Exclusion Zones. The City ordinance authorizes the exclusion of individuals lawfully arrested or convicted of specified drug crimes from drug exclusion zone neighborhoods for 90 days or one year, respectively. The ordinance provides an administrative appeal procedure imposing the burden on the City to prove that the excluded individual committed the specified drug offense in the drug exclusion zone. The ordinance also provides a variance procedure.

City Council's legislative findings identified concentrated illegal drug crime in certain areas of the City, recidivism by individuals arrested or convicted of drug crimes, and the success of a comparable ordinance in Portland, Oregon. App. 105-07. The United States Court of Appeals for the Sixth Circuit conceded that the City has a compelling government interest in enhancing the quality of life in drug-plagued neighborhoods and protecting the

health, safety, and welfare of citizens in those areas. App. 35. This Court also has held that "[t]he government's interest in preventing crime by arrestees is both legitimate and compelling." *United States v. Salerno*, 481 U.S. 739, 749, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

City Council designated Over-the-Rhine – a mixed residential/commercial neighborhood located immediately north of the City's downtown business district – a drug exclusion zone. The City's designation of Over-the-Rhine followed a police report examining City-wide drug arrests. The report, incorporated into the ordinance's factual findings, detailed that 18.7% of the City's drug arrests occurred in Over-the-Rhine. According to the report, reducing the number of drug offenses in Over-the-Rhine was extremely difficult because many arrested individuals returned to the neighborhood immediately upon release. Citing Portland, Oregon's 38% crime reduction in certain neighborhoods following the establishment of a drug exclusion ordinance, the police report characterized a drug exclusion zone ordinance as an important tool to reduce crime and improve the quality of life in Over-the-Rhine.

In 1998, the City amended the ordinance to provide that the 90-day exclusion period when an individual is arrested for a specified drug crime terminates upon acquittal, dismissal of charges, or failure to prosecute. App. 126-29.

Respondent Patricia Johnson was arrested in Over-the-Rhine on March 18, 1998, and charged with a marijuana trafficking offense. As a result of her arrest, Johnson received an exclusion notice prohibiting her from entering Over-the-Rhine from March 24, 1998, until June 22, 1998. Because she was not a bona fide resident of, or employed

in, Over-the-Rhine, Johnson did not qualify for a variance, and she did not appeal her exclusion notice.

After an Ohio grand jury took no action on the marijuana trafficking charge against Johnson, the case against her was terminated on March 27, 1998. Because Chapter 755 had not yet been amended to provide for immediate termination of the exclusion, Johnson remained banned from Over-the-Rhine. When she was found there on April 8, 1998, the City charged her with criminal trespass. This charge was dismissed on February 8, 1999.

Au France, a homeless man, was first arrested in Over-the-Rhine for possession of drug paraphernalia in October 1996. He was convicted on November 11, 1996. He was subsequently arrested and convicted for multiple violations of Chapter 755 and additional drug-related crimes in the neighborhood. Au France applied for a variance on November 17, 1998, and was denied. He did not appeal his exclusion notice.

The Respondents' amended complaint alleged that Chapter 755 was unconstitutional for various reasons. Although the District Court admitted that the City's ordinance addressed compelling government interests (App. 88-89), it held that the ordinance was unconstitutional because it infringed on the Respondents' alleged right to freedom of movement, infringed on their alleged right to freedom of association because they wanted to visit grandchildren and a lawyer, respectively, and violated Respondent Au France's alleged right to be free from double jeopardy. The District Court held that the Fourth Amendment's standard for evaluating the reasonableness of seizures was inapplicable. The District Court declared that a lawfully arrested or convicted individual's interest

in intrastate movement is a fundamental right protected by substantive due process principles and then applied strict judicial scrutiny to the ordinance. It also applied strict judicial scrutiny to the limitation on association. The District Court further found that the temporary exclusion from the drug-infested Over-the-Rhine neighborhood upon conviction of the underlying drug offense was punitive and violated double jeopardy principles. The District Court enjoined enforcement of the ordinance and awarded the Respondents $38,500 in attorney fees.

The City appealed the decision of the District Court to the United States Court of Appeals for the Sixth Circuit. In a 2-1 decision, Judge Gilman dissenting, the Sixth Circuit (District Judge Nancy G. Edmunds sat by designation) affirmed the District Court's decision that the Respondents had constitutionally protected rights to intrastate movement and intimate association that were limited by Chapter 755 and that the ordinance violated those rights. The Sixth Circuit further affirmed the District Court's ruling that the ordinance was facially unconstitutional. Calling it an "extreme measure," the Sixth Circuit nevertheless conceded that it may be possible to temporarily exclude individuals from a high drug-crime area: "[W]e do not foreclose the possibility that a narrower version of the Ordinance, supported by a clearer record, could withstand strict scrutiny. . . . [W]e recognize that municipalities like the City of Cincinnati face formidable challenges in improving the safety and well-being of its citizens in high crimes areas." App. 42.

Judge Gilman's dissenting opinion concluded that the ordinance did not violate the Respondents' alleged rights to movement, association, or freedom from double jeopardy, and that the ordinance satisfied rational basis review

("The City of Cincinnati, as the majority recognizes, faces difficult challenges in its efforts to enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of its citizens in those areas. In my opinion, the ordinance was a constitutionally permissible means to reach that goal."). App. 43, 70.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT COURTS HAVE ISSUED CONFLICTING RULINGS GOVERNING THE NATURE OF CONSTITUTIONAL PROTECTION FOR INTRASTATE MOVEMENT

A. Applicability Of The Fourth Amendment

Invalidating the City's ordinance that temporarily excluded specified individuals from a high drug-crime neighborhood of the City, a panel of the Sixth Circuit held that an individual has a fundamental right to intrastate movement and that any limitation on that right is subject to strict judicial scrutiny. By contrast, just the year before, another panel of the Sixth Circuit held that intrastate movement is not a fundamental right and applied deferential rational basis judicial scrutiny to the government restriction. *Thompson v. Ashe, et al.*, 250 F.3d 399, 406 (6th Cir. 2001). At least one different federal district court has followed the holding of *Thompson v. Ashe, et al.*, and expressly disregarded the holding of the district court in the case at bar. *Doe v. City of Lafayette, Indiana*, 160 F. Supp. 2d 996 (N.D. Indiana 2001).

Responding to the City's position that if an individual's interest in intrastate movement is constitutionally

protected then the Fourth Amendment applies to government limitations on that movement, and drawing a distinction between exclusions occurring pre-trial and exclusions occurring post-conviction, the Sixth Circuit admitted: "Determining whether the Fourth Amendment provides the appropriate framework for evaluating the post-arrest provision of the Ordinance is a more difficult question. Beyond its general statement ~~in *Albright*~~ [*v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994)], the Supreme Court has not yet pinpointed the exact point along the pretrial continuum where the Fourth Amendment's protection gives way to the protection of another Amendment." App. 11. Citing this Court's decision in *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the Sixth Circuit admitted: "To be sure, application of the Ordinance's post-arrest provision resembles a seizure in that it is a show of government authority and a restraint on a freedom of movement." App. 14.

The Sixth Circuit also acknowledged: "And our sister circuits have reached different answers to this question [the applicability of the Fourth Amendment to post-arrest limitations on movement]." App. 11. The Sixth Circuit described Justice Ginsberg's concurring opinion in *Albright*, and her explanation of the Fourth Amendment's "continuing seizure" doctrine, but rejected application of the doctrine with the erroneous rationale that there is no Fourth Amendment seizure unless a limitation on interstate travel compels an ultimate court appearance. App. 14.

The United States Court of Appeals for the First Circuit held, as the City has argued in this case but as the lower courts rejected (App. 80-84; App. 9-14), that when

the liberty of an individual is restrained in a significant way by a show of authority, the individual is seized within the purview of the Fourth Amendment. *Nieves, et al. v. McSweeney, et al.*, 241 F.3d 46 (1st Cir. 2001). The First Circuit indicated that "definitive restrictions on the right to travel" are governed by the Fourth Amendment. *Id.*, p. 57.

Recognizing that the "roots [of the constitutional right to travel] have never been identified with particularity," the United States Court of Appeals for the Second Circuit held that "while a state has the undoubted authority, in connection with a criminal proceeding, to restrict a properly accused citizen's constitutional right to travel outside of the state as a condition of his pretrial release, and may order him to make periodic court appearances, such conditions are appropriately viewed as seizures within the meaning of the Fourth Amendment." *Murphy v. Lynn, et al.*, 118 F.3d 938, 945, 946 (2nd Cir. 1997).

The United States Court of Appeals for the Fourth Circuit, considering allegations of excessive force against a pretrial detainee, rejected the theory that the seizure of a person under the Fourth Amendment continues to the end of trial. *Riley v. Dorton, et al.*, 115 F.3d 1159 (4th Cir. 1997). The Fourth Circuit analyzed the excessive force claims of the pretrial detainee under substantive due process principles.

In *Evans v. Ball, et al.*, 168 F.3d 856, 861 (5th Cir. 1999), the United States Court of Appeals for the Fifth Circuit identified the split in the circuits but concluded that a limitation on the right to travel "is addressable under the Fourth Amendment."

The United States Court of Appeals for the Ninth Circuit concluded that the Fourth Amendment prohibition against unreasonable seizure continues to apply after an arrestee is in the custody of the arresting officer. *Fontana v. Haskin*, 262 F.3d 871, 879 (9th Cir. 2001). The Ninth Circuit noted that the circuits are split on the issue of the applicability of the "continuing seizure approach" to pretrial detainees and others. *Id.*, n. 5.

This Court further justified the position that Fourth Amendment principles govern limitations on the movement of lawfully arrested or convicted individuals. The Court established that an intentionally applied government limitation on the movement of individuals warrants Fourth Amendment review. *Brower v. County of Inyo*, 489 U.S. 593, 599, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (holding that the government's intentional termination of an individual's movement by means of a roadblock constituted a Fourth Amendment seizure); *County of Sacramento v. Lewis*, 523 U.S. 833, 844, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (holding that neither the Fourth Amendment nor substantive due process principles governed *unintentional* harm to an individual during a high-speed automobile chase). Application of the Fourth Amendment balancing standard of review is supported by *United States v. James Daniel Good Real Property, et al.*, 510 U.S. 43, 51, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) ("It is true, of course, that the Fourth Amendment applies to searches and seizures in the civil context and may serve to resolve the legality of these governmental actions without reference to other constitutional provisions."); *Albright v. Oliver*, 510 U.S. 266, 274, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) ("The Framers considered the matter of pretrial

deprivations of liberty and drafted the Fourth Amendment to address it.").

B. Applicability Of The Fourteenth Amendment

Considering constitutional protection for an individual's interest in movement under substantive due process principles, the Sixth Circuit added in the case at bar: "[N]either [the Sixth Circuit] nor the Supreme Court has formally recognized a limited right to intrastate travel." App. 18-19. The Sixth Circuit reiterated that "the Supreme Court has not expressly recognized a fundamental right to intrastate travel. . . ." App. 22. The Sixth Circuit admitted that "the existence of a right to intrastate travel remains an open question in this circuit." Characterizing the "right to freedom of movement" more broadly than "the right to travel locally through public spaces and roadways," the Sixth Circuit addressed "the right to travel locally through public spaces and roadways," characterized it as "fundamentally one of access," and concluded that "the [14th Amendment of the] Constitution protects a right to travel locally through public spaces and roadways." App. 19-20, 25.

Dissenting Judge Gilman disagreed that intrastate travel was a fundamental liberty interest. App. 43. He emphasized: "I believe that this court, like the Supreme Court, must proceed with caution before expanding previously recognized liberty interests to encompass situations that have not yet been encountered." App. 46. Citing various decisions of this Court, Judge Gilman concluded: "This language strongly suggests that no fundamental right to intrastate travel exists." App. 48.

The United States Court of Appeals for the District of Columbia Circuit held: "The Supreme Court in *Maricopa County* specifically declined to decide whether the right to interstate travel recognized in *Shapiro* has its analogue in intrastate travel. The circuits are split on this question." *Hutchins v. District of Columbia*, 188 F.3d 531, 537 (D.C. Cir. 1999). The D.C. Circuit cautioned: "[W]e must ask not whether Americans enjoy a general right of free movement, but rather what[] are the scope and dimensions of such a right (if it exists). . . ." *Id.*, p. 538.

The United States Court of Appeals for the Third Circuit also views the nature of constitutional protection for intrastate movement differently than the Sixth Circuit. In *Lutz v. City of York, Pennsylvania*, 899 F.2d 255, 267 (3rd Cir. 1990), the Third Circuit held that "no constitutional text other than the Due Process Clauses could possibly create a right of localized intrastate movement. . . ." The Third Circuit concluded that the interest in movement is "implicit in the concept of ordered liberty" and "deeply rooted in the Nation's history," but, contrary to the Sixth Circuit's ruling in the case at bar, applied intermediate judicial scrutiny rather than strict scrutiny to the challenged government limitation. *Id.*, p. 268, 269-70.

C. The Circuit Courts Are Split Whether Strict Judicial Scrutiny Applies To The City's Temporary Civil Exclusion Of Lawfully Arrested Or Convicted Individuals From High Drug Crime Neighborhoods

Having determined that fundamental rights protected by substantive due process principles were affected by the City's ordinance, the Sixth Circuit compounded the error by overbroadly ruling that "the government cannot infringe on

[a fundamental liberty interest] 'unless the infringement is narrowly tailored to serve a compelling state interest.'" App. 33. The Sixth Circuit acknowledged the City's position that intermediate judicial scrutiny was the appropriate level of judicial review, *id.*, also acknowledged the "strength of the Third Circuit's reasoning [in *Lutz v. City of York*, 899 F.2d 255, 269-70 (3rd Cir. 1990)] [applying intermediate judicial scrutiny and properly concluding that '[n]ot every governmental burden on fundamental rights must survive strict scrutiny. . . .'"], and even admitted it might apply intermediate judicial scrutiny to "a less severe regulation of localized travel," App. 34, but nonetheless erroneously applied strict judicial scrutiny to Chapter 755's narrow temporary civil exclusion of individuals lawfully arrested or convicted of specified drug crimes.

The Sixth Circuit also agreed with the District Court's conclusion that the City's ordinance advanced a compelling government interest. App. 35. Applying strict judicial scrutiny, however, denigrating the evidentiary value of the unimpeached legislative record before it, and imposing the duty on the City to prove with "some affirmative evidence that there is no less severe alternative," the Sixth Circuit concluded that the ordinance was not the least restrictive alternative for achieving that compelling government interest. App. 37-40.

Not all limitations on fundamental rights are subject to strict scrutiny. This Court held in *United States v. Salerno*, 481 U.S. 739, 748, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) that a balancing standard is appropriate. ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."). This Court has

further justified intermediate judicial scrutiny even when fundamental rights are limited: "[T]he same degree of [narrow] tailoring is not required of these regulations [limiting speech], and least-restrictive alternative analysis is wholly out of place" (*Ward v. Rock Against Racism*, 491 U.S. 781, 798, n. 6, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)); a limitation on expressive conduct, unrelated to the content of the expression, is subject to the form of intermediate judicial scrutiny established in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); viewpoint neutral public benefits for, or limitations on, religion are subject to the form of intermediate scrutiny established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

It was error for the Sixth Circuit to jump to the conclusion that all limitations on fundamental rights are subject to strict judicial scrutiny. Unlike strict judicial scrutiny that is deferential to individual interests, or rational basis scrutiny that is deferential to government interests, intermediate scrutiny essentially requires a balancing of competing interests. Application of intermediate scrutiny to the City's ordinance would not require the City to justify its drug exclusion zone ordinance, as the Sixth Circuit required, by proving that the ordinance was the least restrictive alternative for achieving the City's compelling government interests. Just as limitations on other constitutionally protected rights are not necessarily subject to strict judicial scrutiny, so limitations on movement and association are not necessarily subject to strict judicial scrutiny. The Sixth Circuit erred by applying strict scrutiny to Chapter 755.

There are, therefore, at least four different legal theories presented by federal circuit courts describing the

nature of an individual's interest in movement and the proper standard of judicial review for evaluating a government limitation on that interest: 1) the interest is not constitutionally protected and rational basis review applies; 2) the interest is protected by the Fourth Amendment and the reasonableness standard applies; 3) the interest is protected by substantive due process principles and intermediate scrutiny applies; and 4) the interest is protected by substantive due process principles and strict scrutiny applies.

The case at bar is an opportunity for this Court to clearly establish that the legal nature of a lawfully arrested or convicted individual's interest in movement is not identical to the interest of an individual who has not been lawfully arrested or convicted. Furthermore, the proper standard of judicial review over the City's limitation on that interest is either rational basis review or some form of intermediate scrutiny, not the strict judicial scrutiny applied by the lower courts.

II. THE FEDERAL CIRCUIT COURTS HAVE ISSUED CONFLICTING RULINGS GOVERNING THE NATURE OF CONSTITUTIONAL PROTECTION FOR INTIMATE ASSOCIATION AS IT RELATES TO PARTICIPATING IN THE UPBRINGING OF GRANDCHILDREN AND AS IT RELATES TO VISITING A LAWYER

Respondent Johnson claimed that the City's ordinance unconstitutionally infringed on her alleged freedom of intimate association to participate in the upbringing of her grandchildren. Respondent Au France claimed that the ordinance unconstitutionally infringed on his alleged freedom of intimate association right to visit his lawyer.

Examining the reach of constitutionally protected familial association interests, and admitting that "[n]either the Supreme Court nor this court . . . has addressed the specific issue of whether a grandmother has a fundamental freedom of association right to participate in the upbringing of her grandchildren," the Sixth Circuit concluded that the right to participate in child-rearing extends to grandparents. App. 29, 32.

The Sixth Circuit admitted that its conclusion "is in some tension with [its] prior conclusion in *Thompson v. Ashe*, that a plaintiff had 'no fundamental right to visit his family members on [a public housing development's] property.'" App. 30. The Sixth Circuit added: "Put more succinctly, *Thompson* concluded that the plaintiff had no fundamental right to visit his family members because the Supreme Court had not yet articulated such a right." App. 31. In the case at bar, the Sixth Circuit nonetheless concluded that since Respondent Johnson "has been an active participant in the lives and activities of her grandchildren" she had a fundamental freedom of association right to participate in their upbringing. App. 32.

Asserting that "[m]uch of our system of law is based upon the presumption that one of the most important relationships for 'safeguarding of individual freedom' is that between an individual and his or her attorney," the Sixth Circuit summarily concluded that Respondent Au France had a fundamental freedom of association right to visit his lawyer. App. 32.

Dissenting Judge Gilman disagreed that Respondent Johnson had a fundamental liberty interest to assist in raising her grandchildren and disagreed that Respondent Au France had a fundamental liberty right to visit his

lawyer. App. 43. Citing this Court's decision in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), Judge Gilman limited the alleged liberty interest to one involving living arrangements for relatives "sharing a household," and he did not include within that interest nonresident grandparents desiring to visit their grandchildren. App. 56. Recognizing that Respondent Johnson could still meet her grandchildren outside Over-the-Rhine, communicate with them on the telephone, and correspond with them through the mail, Judge Gilman argued that inconvenience "is not a factor in determining whether Johnson's asserted right is a fundamental liberty interest." App. 60.

In *Troxel v. Granville*, 530 U.S. 57, 70 (2000), a case considering grandparents' visitation rights, the plurality opinion of this Court implicitly questioned whether grandparents have a fundamental liberty interest in being able to visit their grandchildren.

In *Brown v. Ives*, 129 F.3d 209, 211 (1st Cir. 1997), the First Circuit noted that nonresident grandparents have a tenuous claim to constitutionally protected rights. The First Circuit reached a similar conclusion in *Watterson v. Pape*, 987 F.2d 1, 8, n. 6 (1st Cir. 1993). In a case addressing a grandmother's due process rights in associating with her grandchildren, the Seventh Circuit held only that a grandmother had due process rights because, unlike the case at bar, she acted *in loco parentis* to her grandchildren and claimed to have formal custody of the children. *Ellis v. Hamilton*, 669 F.2d 510, 513 (7th Cir. 1982).

Arguing that Respondent Au France did not have a fundamental liberty interest to visit his lawyer, dissenting Judge Gilman cited this Court's decision in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and described

intimate relationships concerning the creation and sustenance of a family previously held constitutionally protected by this Court. Judge Gilman concluded: "[T]he tie between an attorney and his or her client does not represent the 'kinds of personal bonds [that] have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs. . . .'" App. 61-62. Judge Gilman further emphasized that Au France remained free to meet with his attorney away from the attorney's office, speak with him on the telephone, or communicate with him through the mail. App. 53.

The Respondents' alleged intimate association rights have not been established by this Court. The Sixth Circuit erred by extending the right of intimate association to grandparent visits and meetings with lawyers.

III. THE SIXTH CIRCUIT MISAPPLIED STRICT JUDICIAL SCRUTINY

The Sixth Circuit admitted that the City's drug exclusion zone ordinance seeks to achieve compelling government interests in enhancing the quality of life in drug-plagued neighborhoods and to protect the health, safety and welfare of citizens in those areas. App. 35. The Sixth Circuit acknowledged the administrative variance and appeal procedures in the ordinance. App. 4. It admitted that the record established that 18.7% of the City's drug arrests occurred in the Over-the-Rhine exclusion zone neighborhood and that reducing the number of drug offenses was extremely difficult because of the recidivism of the arrested and convicted individuals. App. 5. The Court of Appeals recognized that the legislative record (not

impeached in the trial court) established that the City had relied on the reported 38% reduction in drug crimes resulting from the application of Portland, Oregon's similar drug exclusion zone ordinance. *Id.* The Court further credited the City's other unsuccessful efforts to curb drug crime, App. 37-38, but then held that "such evidence does not demonstrate the ineffectiveness of other law enforcement operations." App. 38.

Nevertheless, notwithstanding that the summary judgment record in support of the City's motion for summary judgment was unimpeached, the Sixth Circuit required even more. It insisted that the City demonstrate that the drug exclusion zone ordinance was the least restrictive alternative by requiring, for instance, that the City "provide some detail on the 'use of foot patrols, bicycle patrols, and the use of the District One Criminal Apprehension Team,' and put forth some evidence demonstrating these efforts were ineffective in reducing drug-related crime in Over-the-Rhine." App. 37-38. The Sixth Circuit held that "strict scrutiny requires legislative clarity and evidence demonstrating the ineffectiveness of proposed alternatives." App. 38. The Sixth Circuit even discounted the City's reliance on Portland, Oregon's success with its drug exclusion zone: "[I]t is not enough that the regulation achieves its ostensible purpose. . . ." App. 38-39.

The City created a fact-based legislative record when it enacted Chapter 755. The City expressly patterned its ordinance after the successful efforts in Portland, Oregon. The City had tried other techniques to curb rampant drug crime in Over-the-Rhine. The City's justification for the ordinance was not impeached before the trial court. There were no genuine issues of material fact. The Sixth Circuit erred by concluding that "the City must do more to consider

potential alternatives." App. 39. Chapter 755 satisfies strict judicial scrutiny.

IV. A TEMPORARY CIVIL EXCLUSION OF AN INDIVIDUAL LAWFULLY CONVICTED OF SPECIFIED DRUG CRIMES FROM A HIGH DRUG CRIME NEIGHBORHOOD DOES NOT VIOLATE THE INDIVIDUAL'S RIGHT TO FREEDOM FROM DOUBLE JEOPARDY

Although it was an issue argued by the City to the Court, the Sixth Circuit did not consider the District Court's ruling that Chapter 755 violated Respondent Au France's right to be free from double jeopardy. App. 42, n. 10. Dissenting Judge Gilman, however, generally agreeing with the City's analysis of the relevant factors derived from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 9 L.Ed.2d 644, 83 S.Ct. 554 (1963), concluded that the ordinance did not violate Au France's right to be free from double jeopardy. App. 43, 63-70. If the Supreme Court otherwise grants this Petition for Writ of Certiorari, it may address the applicability of double jeopardy principles to the temporary civil exclusion of a lawfully convicted individual authorized by Chapter 755.

V. THE FEDERAL DISTRICT COURT DID NOT HAVE JURISDICTION TO FACIALLY INVALIDATE AN ORDINANCE ON FREEDOM OF MOVEMENT OR FREEDOM OF INTIMATE ASSOCIATION GROUNDS

The District Court and the Sixth Circuit invalidated Chapter 755 both facially and as applied to the Respondents. There is a narrow exception to traditional rules of standing to allow federal court jurisdiction over claims

that seek to facially invalidate an ordinance or statute. Jurisdiction may exist over facial claims asserting First Amendment free speech or due process vagueness claims if a plaintiff otherwise has standing. In the case at bar, the claims addressed by the Sixth Circuit include alleged unconstitutional violations of freedom of movement and intimate association. The District Court and the Sixth Circuit did not consider any First Amendment or due process vagueness claims. The Respondents do not have standing to seek facial invalidation of Chapter 755 on the grounds that the ordinance, in all its possible applications, violates every arrested or convicted individual's alleged right to freedom of intrastate movement and freedom of intimate association. Consequently, the Sixth Circuit erred by facially invalidating Chapter 755.

CONCLUSION

The Supreme Court should grant this Petition for Writ of Certiorari in order to determine the nature of federal court jurisdiction over substantive due process claims that an ordinance is facially unconstitutional, resolve the split in the circuits over the nature of an individual's interest in intrastate movement, resolve the split in the circuits over the nature of an individual's interest in intimate association, resolve the split in the circuits concerning the proper level of judicial scrutiny over government limitations on those interests, determine a municipality's burden of proof for establishing that an ordinance addressing compelling government interests is narrowly tailored, and determine the applicability of constitutional protection from double jeopardy to the temporary civil exclusion from high drug

crime neighborhoods of individuals lawfully convicted of specified drug crimes.

Respectfully submitted,

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PATRICIA JOHNSON; MICHAEL AU FRANCE, Plaintiffs-Appellees, v. CITY OF CINCINNATI, Defendant-Appellant.

No. 00-4477

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

310 F.3d 484; 2002 U.S. App. LEXIS 20418;
2002 FED App. 0332P (6th Cir.)

February 1, 2002, Argued

September 26, 2002, Decided

September 26, 2002, Filed

SUBSEQUENT HISTORY:

Rehearing En Banc Denied January 2, 2003, Reported at: 2002 U.S. App. LEXIS 363.

PRIOR HISTORY:

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 98-00441. Susan J. Dlott, District Judge.

DISPOSITION:

Affirmed.

COUNSEL:

ARGUED: Richard Ganulin, CITY SOLICITOR'S OFFICE, Cincinnati, Ohio, for Appellant.

Bernard F. Wong, Cincinnati, Ohio, for Appellee.

ON BRIEF: Richard Ganulin, CITY SOLICITOR'S OFFICE, Cincinnati, Ohio, for Appellant.

Bernard F. Wong, Cincinnati, Ohio, Raymond Vasvari, AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, Cleveland, Ohio, Scott T. Greenwood, GREENWOOD & ASSOCIATES, Cincinnati, Ohio, for Appellees.

JUDGES:

Before: MARTIN, Chief Circuit Judge; GILMAN, Circuit Judge; EDMUNDS, District Judge.* MARTIN, C. J., delivered the opinion of the court, in which EDMUNDS, D. J. joined, GILMAN, J., delivered a separate dissenting opinion.

OPINION BY:

BOYCE F. MARTIN, JR.

OPINION:

BOYCE F. MARTIN, JR., Chief Circuit Judge. The City of Cincinnati appeals the decision of the district court declaring the City's drug-exclusion ordinance, Cincinnati Municipal Code § 755, unconstitutional on its face, and unconstitutional as applied to plaintiffs Patricia Johnson and Michael Au France, and awarding plaintiffs attorney fees. For the reasons set forth below, we AFFIRM the judgment of the district court.

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* The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

A.

On August 7, 1996, the City enacted the Ordinance to enhance the quality of life and protect the health, safety, and welfare of persons in neighborhoods with a "significantly higher incidence of conduct associated with drug abuse than other areas of the City." Cincinnati, Ohio, Ordinance No. 229-1996, § 1(A), (D) (Aug. 7, 1996). To advance this goal, the Ordinance excludes an individual for up to ninety days from the "public streets, sidewalks, and other public ways" in all drug-exclusion zones if the individual is arrested or taken into custody within any drug-exclusion zone for one of several enumerated drug offenses.[1] Cincinnati Municipal Code § 755-5. The Ordinance extends this exclusion for a year if the individual is convicted. *Id.* The Ordinance defines drug-exclusion zones as "areas where the number of arrests for . . . drug-abuse related crimes for the twelve (12) month period preceding the original designation is significantly higher than that for other similarly situated/sized areas of the city." *Id.* § 755-1.

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[1] The offenses include: corrupting another with drugs in violation of R.C. 2925.02, drug trafficking in violation of R.C. 2925.03, drug abuse in violation of R.C. 2925.11 (except for minor misdemeanor violations), possessing drug abuse instruments in violation of R.C. 2925.12, possessing drug paraphernalia in violation of R.C. 2925.14, illegal processing of drug documents in violation of R.C. 2925.23, abusing harmful intoxicants in violation of R.C. 2925.31, trafficking in harmful intoxicants in violation of R.C. 2925.32, and offenses involving counterfeit controlled substances in violation of R.C. 2925.37. § 755-5.

Excluded persons who violate the Ordinance are subject to prosecution for criminal trespass, a fourth-degree misdemeanor. *Id.* The City's chief of police, however, must grant a variance to any person who proves that he or she (1) resided in the drug-exclusion zone prior to receiving the exclusion notice, or (2) was employed by, or owned, a business located in a drug-exclusion zone prior to receiving the exclusion notice. *Id.* § 755-11(2)(b). Provided they have written regulations prohibiting "drug abuse-related activities by their clients and which have entered into a written agreement with the police division concerning the applicability of those rules," social service agencies may also grant variances "for reasons relating to the health, welfare, or well-being of the person excluded, or for drug abuse-related counseling services." *Id.* Variances must be in writing and the individual must keep the variance with him or her at all times within a drug exclusion zone. *Id.* § 755-11(2)(c). The variance becomes void if the holder violates its terms or is subsequently arrested for a drug offense. *Id.* § 755-11(2)(c), (d)(4).

The Ordinance provides an appeal mechanism whereby an excluded individual may file a written request for a hearing within five days of receiving an exclusion notice. *Id.* §§ 755-11; 755-13(a). On appeal, the City must prove, by a preponderance of the evidence, that the excluded individual committed a specified drug offense in a drug-exclusion zone. *Id.* § 755-11(1)(c). The City can sustain or vacate the exclusion notice being challenged, and that determination "is a quasi-judicial decision and is final subject only to appeal to a court of competent jurisdiction." *Id.* § 755-13(C)(c), (D).

In September 1998, the City Council designated Over the Rhine – a mixed residential/commercial neighborhood

located immediately north of the City's downtown business district – a drug exclusion zone. The City's designation of Over the Rhine followed a police report examining City-wide drug arrests from June 1996 to May 1997. The report, which was subsequently incorporated into the Ordinance's factual findings, detailed that 18.7% of City drug arrests occurred in Over the Rhine. According to the report, reducing the number of drug offenses in Over the Rhine was extremely difficult because many arrested individuals returned to the neighborhood immediately upon release. Citing Portland, Oregon's 38% crime reduction in certain neighborhoods following the establishment of a drug exclusion ordinance, the police report characterized a drug-exclusion ordinance as an additional tool to reduce crime and improve the quality of life in Over the Rhine.

In 1998, the City amended the Ordinance to provide that the ninety-day exclusion period terminates upon acquittal, dismissal of charges, or failure to prosecute.

B.

Johnson was arrested on March 18, 1998, for a marijuana trafficking offense in Over the Rhine. At the time of her arrest, she variously lived with Katrina Chambers and Frank Johnson, two of her adult children. Marquisa Harmon, Johnson's other adult daughter, resided in Over the Rhine. Johnson did not reside with Harmon, but she helped care for Harmon's five minor children and regularly took two of the children, Tania and Jaquanna, to school.

As a result of her arrest, Johnson received an exclusion notice prohibiting her from entering Over the Rhine from March 24, 1998, until June 22, 1998. Because she

was not a bona fide resident of, or employed in, Over the Rhine, Johnson did not qualify for a variance, and she did not appeal her exclusion notice.

After an Ohio grand jury took no action on the marijuana trafficking charge against Johnson, the case against her was terminated on March 27, 1998. Because the Ordinance had not yet been amended to provide for immediate termination of the exclusion, Johnson remained banned from Over the Rhine. Thus, when Johnson was found within Over the Rhine on April 8, 1998, the City charged her with criminal trespass. This charge was dismissed on February 8, 1999.

Au France, a homeless man, was first arrested in Over the Rhine for possession of drug paraphernalia in October 1996. He was convicted of this offense on November 11, 1996. He was subsequently arrested and convicted for multiple Ordinance violations and additional drug-related crimes in the neighborhood. As a result of these arrests, convictions, and related exclusions, Au France claims he was prohibited from entering Over the Rhine for four years and spent over four hundred days in jail.

Au France regularly sought food, clothing, and shelter from social service organizations located in Over the Rhine. Moreover, Au France's attorney's office is located in Over the Rhine. Au France applied for a variance on November 17, 1998. The City denied his application, citing his criminal record and lack of a permanent residence in Over the Rhine.

C.

Johnson initially filed suit on June 19, 1998, and both Johnson and Au France filed an amended complaint on December 18, 1998. The plaintiffs alleged that the Ordinance (1) unconstitutionally infringes on their rights to freedom of speech and freedom of association; (2) infringes on their right to freedom of movement in intrastate travel in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses; (3) violates the Eighth Amendment's prohibition against cruel and unusual punishment; and (4) violates the Fifth Amendment's Double Jeopardy Clause. Plaintiffs sought a declaration that the Ordinance is unconstitutional on its face and as applied to them, a permanent injunction prohibiting the City from enforcing the Ordinance, compensatory damages, and reasonable attorney fees and costs.

The district court held that the Ordinance was unconstitutional both as applied and on its face, because it (1) violated the plaintiffs' right to freedom of association; (2) violated the right of excluded persons to freedom of movement in the form of their right to intrastate travel; and, (3) violated Au France's right to be free from double jeopardy. The district court enjoined enforcement of the Ordinance and awarded plaintiffs $38,500 in fees.

Subsequent to the district court's decision, the Ohio Supreme Court declared that the post-conviction portion of the Ordinance violated both the United States Constitution and the State of Ohio Constitution. *State v. Burnett,* 93 Ohio St.3d 419, 755 N.E.2d 857, 865-868 (Ohio 2001), *cert. denied,* 152 L. Ed. 2d 649, 122 S. Ct. 1790 (2002). According to all but one Justice of the Ohio Supreme Court, the Ordinance impermissibly infringed on a

convicted individual's due process right to intrastate travel, specifically, the right to "travel locally through public spaces and roadways" of the state. 755 N.E.2d at 865. The *Burnett* court also ruled that the Ordinance impermissibly exceeded the local authority granted to the City by Section 3, Article XVIII of the Ohio Constitution. 755 N.E.2d 868.

II.

In light of the Ohio Supreme Court's recent decision in *Burnett,* we must first address whether an "actual controversy still exists between the parties." *WJW-TV, Inc. v. City of Cleveland,* 878 F.2d 906, 909 (6th Cir. 1989) (per curiam) (citations omitted); *see also CDI Info. Servs., Inc. v. Reno,* 278 F.3d 616, 618 (6th Cir. 2002) (noting this court's obligation to police its own jurisdiction). We recognized in *WJW-TV, Inc.* that an intervening state supreme court decision on a particular issue may render an appeal to this court on the same issue moot. *Id.* at 910; *see generally* 15 *Moore's Federal Practice* § 101.96 (3d ed. 1997). That the state court resolved the *WJW-TV* issue on state and municipal law grounds did not affect our conclusion. *Id.* (citing *Detroit Fire Fighters Ass'n, Local No. 344, I.A.F.F. v. Dixon,* 572 F.2d 557, 559 (6th Cir. 1978) (per curiam)).

While the *Burnett* court limited its constitutional analysis to the Ordinance's post-conviction exclusion, *Burnett,* 755 N.E.2d at 860 n.3, its state law holding appears to invalidate the entire Ordinance. 755 N.E.2d 868 ("The ordinance, therefore, is invalid under section 3, Article XVIII of the Ohio Constitution."). Thus, *Burnett* could moot the present appeal. In this case, however, the

parties still have an actual case or controversy with respect to the district court's award of attorney fees. *See United Ass'n of Journeymen v. Bechtel Constr. Co.,* 128 F.3d 1318, 1322 (9th Cir. 1997); *Washington Hosp. Ctr. v. Collier,* 292 U.S. App. D.C. 129, 947 F.2d 1498, 1502 (D.C. Cir. 1991). The plaintiffs are entitled to this award only if the Ordinance violated their federal rights; thus, we must evaluate their claim regarding the constitutionality of the Ordinance. 42 U.S.C. § 1988; *Berger v. City of Mayfield Heights,* 265 F.3d 399, 405-06 (6th Cir. 2001).

Lastly, we note that the City's assurance that it no longer enforces the Ordinance, *see Burnett,* 755 N.E.2d at 860, does not render the present appeal moot. "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Deja Vu of Nashville, Inc. v. Met. Gov't of Nashville,* 274 F.3d 377, 387 (6th Cir. 2001) (quoting *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L.E.2d 152 (1982)).

III.

We review a district court's grant of summary judgment *de novo. Gribcheck v. Runyon,* 245 F.3d 547, 550 (6th Cir. 2001). Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

"Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment,

not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Albright v. Oliver,* 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (quoting *Graham v. Connor,* 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L.E.2d [sic] 443 (1989)); *see also Montgomery v. Carter Cy.,* 226 F.3d 758, 769 (6th Cir. 2000); *Cf. United States v. Lanier,* 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (cautioning that not "all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments"). Seeking to ground this dispute in an Amendment other than the Fourteenth Amendment, the City argues that the Fourth Amendment provides the exclusive analytical framework to assess the constitutionality of the Ordinance. According to the City, post-arrest or post-conviction exclusion from Over the Rhine's sidewalks, public walkways, and streets, constitutes, at most, a partial seizure to be evaluated under the rubric of Fourth Amendment reasonableness. We disagree.

Generally, the Fourth Amendment applies to "pretrial deprivations of liberty." *Albright,* 510 U.S. at 274. The Fourth Amendment plainly applies to investigatory stops and formal arrests, but does not apply post-conviction. *See Graham,* 490 U.S. at 395 n.10, *Gerstein v. Pugh,* 420 U.S. 103, 114, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *see also Phelps v. Coy,* 286 F.3d 295, 299 (6th Cir. 2002) ("Which amendment applies depends on the status of the plaintiff at the time of the incident, whether free citizen, convicted prisoner, or something in between."). Thus, there is simply no reasonable basis for the City's assertion that the Fourth Amendment provides the exclusive analytical framework to evaluate the post-conviction provision of the Ordinance.

Determining whether the Fourth Amendment provides the appropriate framework for evaluating the post-arrest provision of the Ordinance is a more difficult question. Beyond its general statement in *Albright,* the Supreme Court has not yet pinpointed the exact point along the pretrial continuum where the Fourth Amendment's protection gives way to the protection of another Amendment. *Graham,* 490 U.S. at 395 n.10 (acknowledging that the Court has not yet "resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins"). And our sister circuits have reached different answers to this question. *Compare Reed v. City of Chicago,* 77 F.3d 1049, 1052 n.3 (7th Cir. 1996) *with Murphy v. Lynn,* 118 F.3d 938, 946 (2d Cir. 1997).

Concurring in *Albright,* Justice Ginsburg stated that a defendant who is released before trial "is scarcely at liberty." 510 U.S. at 279 (Ginsburg, J., concurring) According to Justice Ginsburg, such a defendant "remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges." *Id.; see also id.* at 307 (Stevens, J., dissenting) (noting his agreement with Justice Ginsburg's view that "the initial seizure of petitioner continued until his discharge."); *id.* at 290 (Souter, J., concurring) (noting that movement is restrained when "seizure occurs or bond terms are imposed"); *Gerstein,* 420 U.S. at 114 ("Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty."); *Justices of Boston Municipal Court v. Lydon,* 466 U.S. 294, 301, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984) (stating, in habeas corpus context, that one released on his or her own

recognizance remains in official custody because he is "subjected . . . to restraints not shared by the public generally" such as "an obligation to appear for trial . . . on the scheduled day and also at any subsequent time to which the case may be continued," and a "requirement that he not depart" from the jurisdiction "without leave" of the court) (internal quotation marks omitted). Justice Ginsburg explained:

> The purpose of an arrest at common law, in both criminal and civil cases, was "only to compel an appearance in court," and "that purpose is equally answered, whether the sheriff detains [the suspect's] person, or takes sufficient security for his appearance called bail." (citations omitted). The common law thus seems to have regarded the difference between pretrial incarceration and other ways to secure a defendant's court attendance as a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite.

Id. But see Riley v. Dorton, 115 F.3d 1159, 1163 (4th Cir. 1997) (en banc) (rejecting "continuing seizure" doctrine); *Reed,* 77 F.3d at 1052 n.3 (same).

In a series of malicious prosecution cases, some of our sister circuits – relying primarily on Justice Ginsburg's *Albright* concurrence – have ruled that certain pre-trial detention conditions implicate the Fourth Amendment's prohibition on unreasonable seizures. For example, the Second Circuit held that a judicial order prohibiting the defendant from leaving the state, combined with a directive to attend court appointments, constituted a seizure. *Murphy,* 118 F.3d at 946. Characterizing it as a "close question," the Third Circuit similarly ruled that pretrial

interstate travel restrictions and mandatory court attendance constituted a seizure. *Gallo v. City of Philadelphia,* 161 F.3d 217, 222 (3d Cir. 1998); *see also Evans v. Ball,* 168 F.3d 856, 861 (5th Cir. 1999) (ruling that a "summons to appear in court, coupled with the requirements that [the defendant] obtain permission before leaving the state, report regularly to pretrial services, sign a personal recognizance bond, and provide federal officers with financial and identifying information, diminished [the defendant's] liberty enough to render him seized"); *cf. Nieves v. McSweeney,* 241 F.3d 46, 56-57 (1st Cir. 2001) (holding that defendant's obligation to appear in court did not constitute a seizure); *Britton v. Maloney,* 196 F.3d 24, 29-30 (1st Cir. 1999) (ruling that issuance of a summons did not constitute a seizure).

We have held that a Fourth Amendment seizure "continues throughout the time the person remains in the custody of the arresting officers," *McDowell v. Rogers,* 863 F.2d 1302, 1306 (6th Cir. 1988), but we have not yet addressed whether the seizure could continue past this point. And, while we have held that the issuance of a traffic ticket did not, standing alone, constitute a seizure, *DePiero v. City of Macedonia,* 180 F.3d 770, 789 (6th Cir. 1999), we have not yet explicitly addressed the "continuing seizure" doctrine advanced by Justice Ginsburg. *See Fox v. Van Oosterum,* 176 F.3d 342, 351 & n.7 (6th Cir. 1999); *cf. Phelps,* 286 F.3d at 300 (interpreting *McDowell* as endorsing the "continuing seizure" doctrine). We need not resolve this question in the present case because, even assuming the validity of the "continuing seizure" doctrine, we do not believe that the Fourth Amendment provides the appropriate framework to analyze the Ordinance.

To be sure, application of the Ordinance's post-arrest provision resembles a seizure in that it is a show of government authority and a restraint on a freedom of movement. *See United States v. Mendenhall,* 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L.E.2d 497 (1980) ("We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained."). But in each of the cases addressed by our sister circuits, the government not only curtailed the suspect's right to interstate travel, it also imposed additional restrictions designed to compel an ultimate court appearance, such as obligations to post bond, attend court hearings, and contact pretrial services. *Evans,* 168 F.3d at 861; *Gallo,* 161 F.3d 217 at 222; *Murphy,* 118 F.3d at 946. In contrast, (1) the Ordinance imposes solely travel restrictions; (2) the ninety day exclusion is not bounded by an eventual court appearance; and, (3) the stated purpose of these restrictions is to combat drug crime in Over the Rhine. Thus, we conclude that the Fourth Amendment's prohibition against unreasonable seizures does not provide the appropriate analytical framework for evaluating the constitutionality of such restrictions. Therefore, we turn to the more general protections of due process. *See Phelps,* 286 F.3d at 300 ("If plaintiff is not in a situation where his rights are governed by the particular provision of the Fourth or Eighth Amendment, the more generally applicable provisions of the due process clause still provides the individual some protection against physical abuse by officials.").

IV.

Plaintiffs argue that the Ordinance violates their asserted right to freedom of movement and intrastate

travel because it excludes arrested and convicted individuals from Over the Rhine for ninety days and one year, respectively.

A.

At the outset, we must ascertain whether another panel of this court has already addressed whether the Constitution protects a right to intrastate travel. In answering this question, we address three cases that touch on the question of whether the Constitution protects a right of intrastate travel – *Wardwell v. Board of Education of the City of Cincinnati,* 529 F.2d 625 (6th Cir. 1976), *Kuhnle Brothers, Inc. v. County of Geauga,* 103 F.3d 516 (6th Cir. 1997), and *Thompson v. Ashe,* 250 F.3d 399 (6th Cir. 2001). Of course, without an intervening Supreme Court case or a controlling en banc decision, such a holding would be binding on the present panel. *Darrah v. City of Oak Park,* 255 F.3d 301, 309-10 (6th Cir. 2001); 6th Cir. R. 206(c). This rule does not, however, extend to dicta. *United States v. Jenkins,* 4 F.3d 1338, 1345 n.8 (6th Cir. 1993); *Stockler v. Garratt,* 893 F.2d 856, 859 n.2 (6th Cir. 1990). Thus, we examine our three prior decisions to determine whether another panel has already addressed the question of whether the Constitution protects a right to intrastate travel.

In *Wardwell,* the plaintiff argued that the Cincinnati school board's continuing residency requirement infringed on his constitutionally protected right to travel as defined in *Shapiro v. Thompson,* 394 U.S. 618, 89 S. Ct. 1322, 22 L.E.2d 600 (1969), and *Dunn v. Blumstein,* 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). 529 F.2d at 627. Although those cases involved only interstate travel,

plaintiff argued that they also applied to intrastate travel. *Id.* This court rejected plaintiff's argument,. explaining that: "We find no support for plaintiff's theory that the right to intrastate travel has been afforded federal constitutional protection." After reviewing *Shapiro, Dunn* and *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 94 S. Ct. 1076, 39 L.E.2d 306 (1974), all of which involved residency requirements, the court added that "the aspect of the right to travel with which the Court was concerned in those cases is not involved here." *Id.* Applying rational basis review, the court upheld the school board's continuing residency requirement. 394 U.S. at 628.

Initially, we are satisfied that *Wardwell's* holding – that the Cincinnati school board's continuing residency requirement did not implicate due process protections – does not foreclose plaintiffs' intrastate travel claim. At its simplest, this case does not involve a continuing residency requirement, it involves a constitutional challenge to an ordinance that excludes certain individuals from specified high crime areas of the City of Cincinnati, and presents issues of access not raised in *Wardwell.*

Wardwell also stated that "*Shapiro* and the other right to travel cases are not applicable to intrastate travel and *continuing* employee residency requirements." *Id.* (emphasis in original). One judge of the Ohio Supreme Court read this language to reject any constitutional right to intrastate travel in this circuit. *See Burnett,* 755 N.E.2d at 873 (Cook, J., concurring). Upon inspection, however, this statement does not foreclose a constitutional right to intrastate travel. Rather, *Wardwell's* statement stands for two propositions, neither of which is implicated by the Ordinance: (1) the Supreme Court's interstate travel holdings applied only to interstate travel; and (2) the

Supreme Court's interstate travel cases did not prohibit a school district's residency requirement. Thus, in *Kuhnle Brothers, Inc.*, the panel stated that the question of whether the Constitution protects any right of intrastate travel remained an open question in this circuit. 103 F.3d at 522. ("If such liberty interests [in a fundamental constitutional right to intrastate travel] do in fact exist in this case – a question that will have to be decided on remand because it is not before us and we express no opinion on it . . . .").

The dissent argues that *Wardwell* held that the "rational-basis test applies to determine the constitutionality of a law affecting intrastate travel." But the statement that the dissent relies on does not extend this far: "On the other hand, where, as in the present case, a *continuing* employee residency requirement affecting at most the right of intrastate travel is involved, the 'rational basis' test is the touchstone to determine its validity." 394 U.S. at 628 (emphasis in original). While this statement establishes that continuing employee residency requirements are evaluated under the rational basis test, it does not hold that the rational basis test governs every impairment of an asserted right to intrastate travel. One could infer that the *Wardwell* panel was suggesting that the rational basis test should govern all potential intrastate travel claims, but considered in context of the rest of the opinion, such an inference is not compulsory. Even if such an inference was the only reasonable inference, it would be dicta and would not bind this court. *See Jenkins,* 4 F.3d at 1345 n.8.

Finally, in *Thompson,* this court addressed a challenge to a Tennessee statute prohibiting individuals suspected of having been involved in "drug activities or violent criminal

activities" from trespassing in twelve Knoxville housing developments. 250 F.3d at 403. Although the plaintiff, Thompson, argued the statute violated a number of his constitutional rights, he did not present a right to travel claim to either the district or appellate court. The closest Thompson came to raising an intrastate travel claim was a passing reference to "freedom of movement" in his appellate brief. But Thompson offered no explanation or elaboration of this right, and the cases he cited in support of this purported "freedom of movement" concerned an Eighth Amendment challenge to corporal punishment, *Ingraham v. Wright,* 430 U.S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977), a freedom of association challenge, *Roberts v. Jaycees,* 468 U.S. 609, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984), and a challenge to a government contract bidding process, *see United of Omaha Life Ins. Co. v. Solomon,* 960 F.2d 31 (6th Cir. 1992). As a result, the panel rejected Thompson's argument as "without merit," and added that "to the extent that Thompson refers to the 'right to travel,' as recognized by our jurisprudence, that right is essentially a right of interstate travel." *See Thompson,* 250 F.3d at 406. In the panel's two paragraph disposal of Thompson's "freedom of movement" mention, the panel cited only the Supreme Court's most recent interstate travel case, *Saenz v. Roe,* 526 U.S. 489, 143 L. Ed. 2d 689, 119 S. Ct. 1518 (1999), and did not discuss whether the Constitution protects a limited right of intrastate travel. *Id.*

Given that Thompson never asserted a right to intrastate travel, we cannot find that the *Thompson* court held that the Constitution does not protect any right of intrastate travel. Moreover, even if we were to analyze the panel's statement, we find that it says only that neither

this court nor the Supreme Court has formally recognized a limited right to intrastate travel. While we have no quarrel with this statement of law, we emphasize that such a statement is quite apart from saying that this court or the Supreme Court has rejected a right to intrastate travel. Under these circumstances, we conclude that the existence of a right to intrastate travel remains an open question in this circuit.

B.

In analyzing whether a particular right implicates the protection of the Due Process Clause, we first carefully define the asserted right and then ask whether it is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L.E.2d [sic] 772 (1997) (internal quotation marks and citations omitted); *see also Michael H. v. Gerald D.,* 491 U.S. 110, 122, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989). Given these instructions, we believe the relevant, asserted right implicated by this case is a right to travel locally through public spaces and roadways. *See Lutz,* 899 F.2d 255, 268 (3d Cir. 1990) ("The right or tradition we consider may be described as the right to travel locally through public spaces and roadways.") While the terms are often used interchangeably, we do not use the right to travel locally through public spaces and roadways synonymously with a right to freedom of movement. To be sure, a right to freedom of movement could encompass a right to localized travel, but it could also include interstate and international travel components. While we draw from historical sources discussing a freedom of movement, and

find their authority instructive, our holding is limited to the right to travel locally through public spaces and roadways. Moreover, while we can conceive of different articulations of a right to intrastate travel, the right we address – the right to travel locally through public spaces and roadways – is fundamentally one of access.

C.

"The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States v. Guest,* 383 U.S. 745, 757, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966); *see also Saenz,* 526 U.S. at 498 (describing the constitutional right to travel as "firmly embedded" in the Supreme Court's jurisprudence). It is "assertable against private interference as well as government action . . . . a virtually unconditional personal right, guaranteed by the Constitution to us all." *Shapiro,* 394 U.S. at 643 (Stewart, J., concurring). The right to interstate travel embraces three different components: (1) "the right of a citizen of one State to enter and to leave another state"; (2) "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State"; and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz,* 526 U.S. at 500. The Supreme Court has not yet identified the source of the first travel right, but the latter two components are expressly protected by the Privileges and Immunities Clause. *Id.* at 501-03.

The Supreme Court has not yet addressed whether the Constitution also protects a right to intrastate travel. *Mem'l Hosp.*, 415 U.S. at 255-56. Both the district court in this case, 119 F. Supp. 2d. 735 at 745-46, and the Ohio Supreme Court in *Burnett,* 755 N.E.2d at 865-66, recognized a limited constitutional right to intrastate travel and concluded that the Ordinance impermissibly infringed on this right. *See also Spencer v. Casavilla,* 903 F.2d 171, 174 (2d Cir. 1990) (recognizing that the Constitution "protects the right to travel freely within a single state"); *Lutz,* 899 F.2d at 268 (holding that "the right to move freely about one's own neighborhood or town" is a fundamental liberty interest protected by the Due Process Clause); *Hutchins v. District of Columbia,* 338 U.S. App. D.C. 11, 188 F.3d 531, 561-62 (D.C. Cir. 1999) (Rogers, J., dissenting in part, concurring in part, joined by Tatel and Wald, JJ.) ("[P]recedents recognize a fundamental right to walk through public streets without thereby subjecting oneself to police custody."); *see also* 188 F.2d at 538 (plurality) (Silberman, J.) (accepting that a "draconian curfew" might implicate substantive due process); *Pottinger v. City of Miami,* 810 F. Supp.1551, 1578-81 (S.D. Fla. 1992) [2]; *City of Seattle v. McConahy,* 86 Wn. App. 557, 937 P.2d 1133, 1141 (Wash. App. 1997).[3]

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[2] *But see Wright v. City of Jackson,* 506 F.2d 900, 902-03 (5th Cir. 1975).

[3] A number of state courts have also ruled that their respective state constitutions protect a right to intrastate travel. *See Watt v. Watt,* 971 P.2d 608, 615 (Wyo. 1999) ("The right to travel freely throughout the state is a necessary and fundamental aspect of our emancipated society, and it is retained by the citizens."); *Brandmiller v. Arreola,* 199 Wis. 2d 528, 544 N.W.2d 894, 899 (Wisc. 1996) ("We recognize that the

(Continued on following page)

Although the Supreme Court has not expressly recognized a fundamental right to intrastate travel, as early as the Articles of Confederation, state citizens "possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom." *United States v. Wheeler,* 254 U.S. 281, 293, 41 S. Ct. 133, 65 L.E. 270 (1920). As Chief Justice Taney observed:

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, *as freely as in our own States.*

Smith v. Turner, 48 U.S. (7 How.) 283, 492, 12 L. Ed. 702, 790 (1849) (Taney, C.J., dissenting) (emphasis added); *see also Civil Rights Cases,* 109 U.S. 3, 39, 3 S. Ct. 18, 27 L.E. 835 (1883) (Harlan, J., dissenting) (noting that

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right to travel intrastate is fundamental among the liberties preserved by the Wisconsin Constitution. This right to travel includes the right to move freely about one's neighborhood, even in an automobile."); *State v. Shigematsu,* 52 Haw. 604, 483 P.2d 997, 1001 (Haw. 1971) (recognizing right to freedom of movement, which "includes the right of men to move from place to place, to walk in the fields in the country or on the streets of a city, [and] to stand under open sky."); *State v. Cuypers,* 559 N.W.2d 435, 437 (Minn. App. 1997) ("Minnesota also recognizes the right to intrastate travel."); *City of New York v. Andrews,* 186 Misc. 2d 533, 719 N.Y.S.2d 442, 452 (N.Y. Sup. Ct. 2000) ("There can be no doubt that our State Constitution, no less than the Federal Constitution, supports the right to travel freely within the State."); *see also City of Bismarck v. Stuart,* 546 N.W.2d 366, 367 (N.D. 1996) (implying existence of right).

"personal liberty consists, says Blackstone, in the power of locomotion, of changing situation, or removing one's person to whatever place one's own inclination may direct, without restraint, unless by due course of law") (internal quotations omitted). Or as the Supreme Court noted at the turn of the twentieth century: "The right to remove from one place to another according to inclination, is an attribute of . . . liberty . . . secured by the Fourteenth Amendment and by other provisions of the Constitution." *Williams v. Fears,* 179 U.S. 270, 274, 21 S. Ct. 128, 45 L. Ed. 186 (1900). More recently, Justice Stevens, joined by Justice Souter and Justice Ginsburg, observed:

> It is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" *Kent v. Dulles,* 357 U.S. 116, 126, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).

City of Chicago v. Morales, 527 U.S. 41, 54, 119 S. Ct. 1849, 144 L.E.2d 67 (1999); *see also Kolender v. Lawson,* 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (noting that anti-loitering statute, which required individuals to provide "credible and reliable" identification, "implicated consideration of the constitutional right to freedom of movement"); *Papachristou v. City of Jacksonville,* 405 U.S.156, 164, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972) (describing walking, loitering, and wandering as "historically part of the amenities of life as we have known them."); *Guest,* 383 U.S. at 759 ("Freedom to travel throughout the United States has long been recognized as

a basic right under the Constitution."); *Nunez v. City of San Diego,* 114 F.3d 935, 944 (9th Cir. 1997) ("Citizens have a fundamental right of free movement, 'historically part of the amenities of life as we have known them.'") (citation omitted); *Burnett,* 755 N.E.2d at 865 ("This freedom of mobility is a tradition extending back to when the first settler crossed into what would eventually become this great state, and it is a tradition no Ohioan would freely relinquish."); *Gomez v. Turner,* 217 U.S. App. D.C. 281, 672 F.2d 134, 143-44 n.18 (D.C. Cir. 1982) (noting that the ability to "walk the streets, without explanation or formal papers is surely among the cherished liberties that distinguish this nation from so many others.").[4] In light of these cases, we find that the right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage.

In addition to its solid historical foundation, the tremendous practical significance of a right to localized

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[4] Writing in 1971, the Second Circuit keenly observed that "it would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *King v. New Rochelle Mun. Hous. Auth.,* 442 F.2d 646, 648 (2d Cir. 1971); *see also Burnett,* 755 N.E.2d at 865 ("Without the one, there would never be the other."). While we credit this observation, we cannot rely on this proposition because recent Supreme Court cases demonstrate that the Court has not yet definitely located the textual source of the right to interstate travel. *Lutz,* 899 F.2d at 261. As the Third Circuit noted: "One consequence of the Court's refusal in *Shapiro* and its progeny to ground the right to travel in particular constitutional text is that there exists some uncertainty as to whether it is, in fact, 'a fundamental precept of personal liberty.'" *Id.* Of course, if the right to interstate travel is, in fact, grounded in substantive due process, the Second Circuit's point is "unimpeachable." *Id.*

travel also strongly suggests that such a right is secured by substantive due process. The right to travel locally through public spaces and roadways – perhaps more than any other right secured by substantive due process – is an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function. In the words of Justice Douglas:

> Freedom of movement, at home and abroad, is important for job and business opportunities – for cultural, political, and social activities – for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.

Aptheker v. Secretary of State, 378 U.S. 500, 519-20, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964) (Douglas, J., concurring); *see also Hutchins,* 188 F.3d at 561 (Rogers, J.) (dissenting in part, concurring in part). The Ordinance itself references an individual's "significant private interest in being able to travel and associate freely in all areas of the City." In view of the historical endorsement of a right to intrastate travel and the practical necessity of such a right, we hold that the Constitution protects a right to travel locally through public spaces and roadways.

V.

Plaintiffs argue that exclusion from Over the Rhine pursuant to the Ordinance infringes upon their constitutional right to freedom of association. Freedom of

association is not an enumerated constitutional right, but arises as a necessary attendant to the Bill of Rights' protection of individual liberty interests. *See Roberts v. United States Jaycees,* 468 U.S. 609, 617-618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

A.

In *Roberts,* the Supreme Court identified two forms of constitutionally-protected associational rights: "freedom of intimate association" and "freedom of expressive association." *Id.* The freedom of intimate association, which is applicable to plaintiffs' claims here, stems from the necessity of protecting individuals' ability "to enter into and maintain certain intimate human relationships [that] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* Constitutionally protected intimate associations include those "personal bonds [that] have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs," and that "thereby foster diversity and act as critical buffers between the individual and the power of the State." *Id.* at 618-19.

Johnson claims that the Ordinance unconstitutionally infringes on her freedom of association right to participate in the upbringing of her grandchildren. Au France claims that the Ordinance unconstitutionally infringes on his freedom of association right to visit his attorney. Because both plaintiffs' claims involve intimate relationships that "foster diversity and act as critical buffers between the individual and the power of the State," we examine their

claims under the freedom of intimate association framework articulated in *Roberts.*

B.

Johnson's claim necessitates an examination of the reach of constitutionally protected familial association interests.

The Supreme Court has recognized that some of the most important personal bonds necessary for the protection of individual freedom "are those that attend the creation and sustenance of a family – [including] the upbringing and education of children." *Roberts,* 468 U.S. at 619 (citing *Smith v. Org. of Foster Families,* 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977)). Accordingly, the Supreme Court has consistently recognized associational rights involving private family life as worthy of special constitutional protection. *See Moore v. City of East Cleveland,* 431 U.S. 494, 499, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1976) ("A host of cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter.'") (plurality opinion) (quoting *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944)).[5]

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[5] Citing *Meyer v. Nebraska,* 262 U.S. 390, 399-401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Roe v. Wade,* 410 U.S. 113, 152-153, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *Wisconsin v. Yoder,* 406 U.S. 205, 231-233, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); *Ginsberg v. New York,* 390 U.S. 629, 639, 88 S. Ct. 1274, 20 L. Ed. 2d 195, 44 Ohio Op. 2d 339 (1968); *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L.

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Both Supreme Court precedent and our national tradition suggest that a family member's right to participate in child rearing and education is one of the most basic and important associational rights protected by the Constitution. *Cf. M.L.B. v. S.L.J.,* 519 U.S. 102, 116, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (plurality opinion) ("Choices about marriage, family life, and the *upbringing of children* are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (quoting *Boddie v. Connecticut,* 401 U.S. 371, 376, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)) (internal punctuation omitted) (emphasis added); *Moore,* 431 U.S. at 503-04 ("The Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.") (footnotes omitted); *see also Roberts,* 468 U.S. at 619-620 ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.").

Ed. 2d 510 (1965); *Poe v. Ullman,* 367 U.S. 497, 542-544, 549-553, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (Harlan, J., dissenting); *Loving v. Virginia,* 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); *May v. Anderson,* 345 U.S. 528, 533, 73 S. Ct. 840, 97 L. Ed. 1221, 52 Ohio Op. 45, 67 Ohio Law Abs. 468 (1953); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).

Moreover, nothing in our tradition or precedent can credibly be read to suggest that the right to participate in child rearing does not extend to grandparents. *See, e.g., Moore,* 431 U.S. at 504 ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.") (emphasis added) (footnote omitted).

C.

Neither the Supreme Court nor this court, however, has addressed the specific issue of whether a grandmother has a fundamental freedom of association right to participate in the upbringing of her grandchildren.

Our decision in *Bazzetta v. McGinnis,* 286 F.3d 311, 316 (6th Cir. 2002), provides some guidance. There, we examined the constitutional validity of a prison regulation that prohibited prisoners from receiving visits from their minor siblings, nieces and nephews. We struck down the regulation because it was unrelated to legitimate penological goals. *Id.* Implicit in our analysis was the recognition that an inmate's ability to visit with his or her minor siblings, nieces and nephews involves constitutionally protected associational rights. *See id.* at 317 ("Close analysis is especially appropriate when, as is the case here, the challenged restrictions interfere with family relationships . . . specially protected by the Constitution."). The right to participate in the upbringing of one's grandchild occupies a basic position in our society's hierarchy of values and is of a more intimate – and therefore more

fundamental – nature than the right to visit one's nieces or nephews. Therefore, a logical extension of *Bazzetta's* reasoning suggests that Johnson has a fundamental freedom of association right to participate in the upbringing of her grandchildren.

Bazzetta's implicit conclusion, that a prisoner has a right to receive certain family members as visitors, is in some tension with this court's prior conclusion in *Thompson v. Ashe,* that a plaintiff had "no fundamental right to visit his family members on [a public housing development's] property." 250 F.3d at 406-07.

In *Thompson,* the plaintiff challenged the constitutionality of a "no trespass" list, which kept him from visiting family members in a public housing development.[6] *Id.* The *Thompson* court addressed the issue as follows: First, it acknowledged that the Bill of Rights protects the right to "enter into and maintain certain intimate or private relationships" and listed specific relationships that the "Supreme Court has accorded constitutional protection to." *Id.* (noting that the Supreme Court "has accorded constitutional protection to marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives") (citations omitted). The *Thompson* court then noted that the plaintiff did not claim an association interest to which the Supreme Court had previously accorded constitutional protection – i.e., cohabitation with relatives – and that the "Court has

[6] Beyond a passing reference to a brother, *Thompson* does not specify which of the plaintiff's family members lived in the housing project.

not extended constitutional protection to mere visitation with family members." *Id.* (emphasis added). Without further explanation, the *Thompson* panel concluded that the plaintiff did not have a fundamental right to visit his family members.

Put more succinctly, *Thompson* concluded that the plaintiff had no fundamental right to visit his family members because the Supreme Court had not yet articulated such a right. That the Supreme Court's recognition of a right establishes that right's existence for lower courts, however, tells us nothing about the existence of rights that the Court has not yet addressed. Unless one accepts the indefensible premise that the absence of a Supreme Court opinion on the existence of a particular right means that a particular right does not exist, there is simply no reason to infer the absence of a fundamental right to visit a family member based on the fortuity that the Supreme Court has not yet addressed the issue.

Notwithstanding our concerns, we nevertheless would be bound by *Thompson's* conclusion – as opposed to *Bazzetta's* implicit conclusion – if Johnson had merely asserted a fundamental right to visit her daughter or grandchildren. 6th Cir. R. 206(c); *see also United States v. Smith,* 73 F.3d 1414, 1418 (6th Cir. 1996).

The issue before this court, however, is whether Johnson has a fundamental associational right to participate in the education and rearing of her grandchild. Unlike the plaintiff in *Thompson,* Johnson has been an active participant in the lives and activities of her grandchildren, with the consent and support of the children's mother. *Thompson* itself recognized the distinction between participating in child rearing and merely visiting

one's family. *See Thompson,* 250 F.3d at 407 (acknowledging that "the Court has accorded constitutional protection to . . . child rearing and education") (citing *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)). Moreover, to the extent that *Thompson* can be read to proclaim the absence of a fundamental right to participate in child-rearing it conflicts with Supreme Court precedent and cannot bind this court. *See Pierce,* 268 U.S. at 534-35 (recognizing a fundamental child-rearing right); *Meyer,* 262 U.S. at 398 (noting that "without doubt" the liberty interest guaranteed by the Fourteenth Amendment denotes the right to "establish a home and bring up children").

Accordingly, we find that Johnson does have a fundamental freedom of association right to participate in the upbringing of her grandchildren.

D.

Our analysis of Au France's claim – that the Ordinance infringes on his freedom of association right to visit his attorney – is more straightforward. Much of our system of law is based upon the presumption that one of the most important relationships for "safeguarding of individual freedom" is that between an individual and his or her attorney. *See Roberts,* 468 U.S. at 617-618. It simply cannot be denied that an individual's relationship with his or her attorney "acts as a critical buffer between the individual and the power of the State." *See id.* Accordingly, we find that Au France has a fundamental freedom of association right to visit his attorney.

VI.

Having addressed the existence of the relevant rights, we now turn to whether the Ordinance infringes on those rights, and if it does, whether it is nevertheless sufficiently tailored to allow the Ordinance to pass judicial scrutiny.

A.

1.

Ordinarily, where a fundamental liberty interest protected by the substantive due process component of the Fourteenth Amendment is involved, the government cannot infringe on that right "unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg,* 521 U.S. at 721 (citation omitted); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303, 309 (6th Cir. 1983). Notwithstanding this general rule, the City contends that the intermediate scrutiny applicable to content-neutral time, place and manner regulations of otherwise protected First Amendment activity should guide our review of the Ordinance. In support of its contention, the City relies primarily on the Third Circuit's decision upholding the City of York's anti-cruising ordinance, which prohibited driving repeatedly through a loop of certain major public roads through York's center. *Lutz,* 899 F.2d at 270. But instead of regulating the manner in which affected individuals access Over the Rhine (i.e., an anti-cruising ordinance), or the time of access (i.e., a curfew), the Ordinance imposes a more severe restriction, broadly prohibiting individuals to

access the entire neighborhood,[7] which the City advertises as the largest national historic district in the nation, the City's fastest growing entertainment district and home to nearly 10,000 City residents.[8] Thus, while we acknowledge the strength of the Third Circuit's reasoning,[9] and we do not foreclose the possibility of applying intermediate scrutiny to a less severe regulation of localized travel, the broad prohibition of the Ordinance requires that we apply strict scrutiny.

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[7] Unlike a "time" or "manner" regulation, a "place" regulation is more difficult to transfer from the First Amendment context to the localized travel context. After all, regulating the place of speech does not foreclose speech or association in the same way as regulating the place of travel might. Nevertheless, we do not foreclose the possibility that a narrow "place" restriction might be more appropriately analyzed under intermediate scrutiny.

[8] *See* http://www.cincinnatihome.org/neighborhoods/overtherhine.

[9] As Judge Becker explained:

> Just as the right to speak cannot conceivably imply the right to speak whenever, wherever and however one pleases – even in public fora specifically used for public speech – so too the right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases – even on roads specifically designed for public travel. Unlimited access to public fora or roadways would result not in maximizing individuals' opportunity to engage in protected activity, but chaos. To prevent that, state and local governments must enjoy some degree of flexibility to regulate access to, and use of, the publicly held instrumentalities of speech and travel.

899 F.2d at 269.

2.

We agree with the district court's conclusion that the City's interest in enacting the Ordinance – to enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of citizens in those areas – represents a compelling government interest. The question, then, is whether the Ordinance is narrowly tailored to serve that interest.

To determine whether the Ordinance is narrowly tailored to achieve the City's compelling interest in reducing drug abuse and drug-related crime, we (1) assess whether the Ordinance implicates an individual's interest in localized travel with specific reference to the precise nature of the infringement and (2) determine whether the Ordinance is the least restrictive means to accomplish the City's goal. In making this latter inquiry, we ask whether any other methods exist to achieve the desired results of enhancing the quality of life and protecting the health, safety, and welfare of citizens in high drug-crime neighborhoods. "If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Dunn,* 405 U.S. at 343.

The Ordinance bars excluded individuals from each and every public space and roadway in Over the Rhine. In our view, the right to travel locally through public spaces and roadways is essentially a right of access. By blocking affected individuals' access to an entire metropolitan neighborhood of 10,000 people, the Ordinance therefore plainly infringes on the right to localized travel through the public spaces and roadways of Over the Rhine.

In denying access, the Ordinance initially presents constitutional tailoring problems because it broadly excludes individuals from Over the Rhine without regard to their reason for travel in the neighborhood. Thus, the Ordinance prohibits Johnson from engaging in an array of not only wholly innocent conduct, but socially beneficial action like caring for her grandchildren and walking them to school. Likewise, the Ordinance bans Au France from seeking food, shelter, social services and meeting with his attorney in the Over the Rhine, at the same time it bans him from pursuing illegal drugs in Over the Rhine.

The broad sweep of the Ordinance is compounded by the fact that the Ordinance metes out exclusion without any particularized finding that a person is likely to engage in recidivist drug activity in Over the Rhine. In *United States v. Salerno,* 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), the Supreme Court upheld the Bail Reform Act of 1984, which allowed for the pretrial detainment of arrestees. *Id.* at 750-52. The Court acknowledged the "importance and fundamental nature" of an individual's interest in liberty, but emphasized that "this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *Id.* at 750-51. Thus, "when the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." *Id.* at 751.

In stark contrast to the Bail Reform Act, the Ordinance (1) automatically applies to persons arrested or convicted without any individualized consideration, let alone consideration by a neutral arbiter, and (2) does not

require any particularized finding that the arrested or convicted individual is likely to repeat his or her drug crime. In place of the Bail Reform Act's neutral, individualized adjudication, the Ordinance relies on only general evidence that individuals arrested and/or convicted for drug activity in Over the Rhine typically return to the neighborhood and repeat their offenses. While we credit this general evidence, it is insufficient to override an individual's interest in localized travel. In the same way that due process demands certain procedural safeguards before an individual can be detained pending trial, we find that due process also demands some individualized consideration before an individual's right to localized travel can be restricted. Along with the broad sweep of the Ordinance, the City's failure to include procedural safeguards resembling the protections incorporated into the Bail Reform Act, weighs heavily against finding the Ordinance constitutional.

Above all, we are most troubled by the prior version of the Ordinance because it curtailed an individual's right to localized travel even after his or her drug charge was dropped or abandoned. In practice, then, the Ordinance undoubtedly penalized innocent individuals. By excluding innocent individuals, the Ordinance not only unquestionably violated the constitutional rights of affected individuals, it failed to serve the purposes of the Act.

3.

With respect to less restrictive alternatives, the City contends that the Ordinance is narrowly tailored because the City's "other attempts to curb the incidence of drug crime failed." In support of this assertion, the City argues

that drug and prostitution activity remained constant in Over the Rhine, notwithstanding "an effort to increase police presence in the area through the use of foot patrols, bicycle patrols, and use of the District One Criminal Apprehension Team." Similarly, the City cites the report's statement that, "In July of 1995, several covert operations resulted in the arrests of 16 persons for soliciting prostitution, as well as 5 persons for felony drug violations. Even though covert operations continued on a monthly basis, seven months later, efforts in February and March of 1996, still resulted in 21 soliciting arrests and 50 various drug arrests."

We, of course, "do not demand of legislatures scientifically certain criteria of legislation." *Ginsburg v. New York,* 390 U.S. 629, 642, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) (internal quotations omitted). But when constitutional rights are at issue, strict scrutiny requires legislative clarity and evidence demonstrating the ineffectiveness of proposed alternatives. *See Grutter v. Bollinger,* 288 F.3d 732, 749-51 (6th Cir. 2002). Thus, the City would have to provide some detail on the "use of foot patrols, bicycle patrols, and use of the District One Criminal Apprehension Team," and put forth some evidence demonstrating these efforts were ineffective in reducing drug-related crime in Over the Rhine. Similarly, while we credit the City's statistical evidence regarding covert operations, such evidence does not demonstrate the ineffectiveness of other law enforcement operations.

The City's citation to the experiences of Portland, Oregon is also misplaced in considering narrow tailoring. Even if we were to extrapolate that what worked in Portland would likely work in Over the Rhine, this fact would not sustain the Ordinance. In considering whether a

government regulation is narrowly tailored, it is not enough that the regulation achieves its ostensible purpose, it must do so without unnecessarily infringing upon constitutionally protected rights.

Beyond its conclusory claims that other efforts to combat drug crime were unsuccessful, the police department's report does not contain any indication that the City or its police department evaluated alternatives to the Ordinance. Faced with such a record, we cannot conclude that other alternatives could not achieve the same intended goals of the Act. While we are prepared to accept the legislative judgment of the City regarding potential alternatives, *see Grutter,* 288 F.3d at 751, the City nevertheless bears the burden of identifying potential alternatives. Given the nature of the right at issue – indeed, the Ordinance itself proclaims that "individuals have a significant private interest in being able to travel and associate freely in all areas of the city" – the City must do more to consider potential alternatives. It is, of course, possible that a regulation like the Ordinance might be the narrowest method of addressing a seemingly uncontrollable drug and crime epidemic. But without some affirmative evidence that there is no less severe alternative, we cannot conclude that the Ordinance, in its present form, survives constitutional scrutiny.

4.

Finally, the Ordinance's variance mechanism does not save the Ordinance from constitutional infirmity because it only protects the constitutional right to localized travel for a limited group of affected individuals. In allowing individuals to seek variances if they live or work or seek

social services in Over the Rhine, the Ordinance effectively preserves the right to travel locally through public spaces and roadways for some individuals. However, the Ordinance does nothing to protect the constitutional rights of all other affected individuals. The Ordinance's variance mechanism eases some of the burden of exclusion for some individuals, but it does not alleviate the fundamental constitutional problem that the Ordinance blocks the right to travel locally through public spaces and roadways.

B.

1.

The Ordinance also implicates Johnson and Au France's rights to freedom of association. Prior to receiving an exclusion notice, Johnson actively participated in caring for five of her grandchildren, all of whom resided in Over the Rhine. Johnson regularly picked up two of her grandchildren, Tania and Jaquanna, and walked them to and from school. After her arrest and ninety day exclusion, Johnson was effectively banished from Over the Rhine, and precluded from her regular role in caring for her grandchildren. Therefore, the Ordinance plainly infringed on Johnson's right to participate in the rearing of her grandchildren.

Along similar lines, Au France's exclusion from Over the Rhine prohibited him from traveling to his attorney's office in Over the Rhine. In Au France's case, this exclusion was particularly problematic because Au France was homeless, thus he had no readily available, realistic alternative to communicate with his attorney. For example, Au France's lawyer could not take the exceptionally accommodating step of making a "house call" to discuss Au

France's legal affairs. And, as a homeless individual, Au France lacked access to a private telephone to seek and receive legal advice. Given the obviously privileged nature of his conversations, it cannot be said that Au France's access to the City's predominantly, unenclosed public phones, alleviated his problem of access. An urban street corner simply does not provide a sufficient guarantee of privacy and a realistically effective guard against disclosure of privileged and confidential information to be considered a viable alternative. Even if Au France secured a wholly enclosed public phone, he is homeless, and thus, in all likelihood lacks the money for anything more than a short conversation with his attorney. Thus, the Ordinance not only blocked Au France's physical access to his attorney's office, it effectively blocked all access to his attorney. While this a troubling scenario regardless of the underlying factual circumstances, it is particular troubling in Au France's case. Au France is a homeless man, existing at the margins of our society, where he is uniquely vulnerable and in particular need of unobstructed access to legal representation and a buffer against the power of the State.

In evaluating plaintiffs' associational challenges, we encounter the same flaws in the Ordinance that we encountered in evaluating the right to localized travel. Namely, the combination of the broad sweep of the Ordinance and the lack of individualized consideration prior to exclusion. And, while the variance mechanism has the effect of protecting some associational rights, it does not protect the associational rights of either Johnson or Au France. In this respect, the Ordinance's variance mechanism deviates from the variance procedures utilized in the juvenile curfew ordinances upheld by our sister circuits. In those cases, the operative variance specifically exempted

constitutionally protected activity. *See Schleifer v. City of Charlottesville,* 159 F.3d 843, 852 (4th Cir. 1998) ("Under Charlottesville's curfew, minors are allowed . . . to undertake interstate travel; and to engage freely in any activity protected by the First Amendment."); *Qutb v. Strauss,* 11 F.3d 488, 494 (5th Cir. 1993) ("Most notably, if the juvenile is exercising his or her First Amendment rights, the curfew ordinance does not apply."); *see also Nunez,* 114 F.3d at 948 (finding San Diego's ordinance "problematic" because it did not "provide exceptions for many legitimate activities, with or without parental permission")

C.

In striking down the Ordinance, we do not foreclose the possibility that a narrower version of the Ordinance, supported by a clearer record, could withstand strict scrutiny. Temporary exclusion is an extreme measure, but we recognize that municipalities like the City of Cincinnati face formidable challenges in improving the safety and well-being of its citizens in high crimes areas. While we have every confidence that the City acted in the utmost good faith and with the best intentions in enacting the Ordinance, the Ordinance, in its present form, does not withstand constitutional scrutiny.[10]

[10] Because we find that the Ordinance unconstitutionally infringes on plaintiffs' rights to freedom of association and a right to localized travel, we do not reach Au France's double jeopardy claim.

VII.

For the foregoing reasons, we AFFIRM the judgment of the district court.

DISSENT BY RONALD LEE GILMAN.

DISSENT:

RONALD LEE GILMAN, Circuit Judge, dissenting. The majority has concluded that the ordinance in question violated the plaintiffs' fundamental rights to intrastate travel and to freedom of association. To the contrary, I am of the opinion that this court has previously held that no fundamental right to intrastate travel exists. Moreover, I do not share the majority's belief that the ordinance violated the plaintiffs' rights to freedom of association. I therefore conclude that the ordinance did not infringe upon the plaintiffs' fundamental rights. The ordinance was thus subject to the lower standard of rational basis review, which I believe it met. I also conclude that the ordinance did not violate the Double Jeopardy Clause of the Fifth Amendment, an issue that the majority had no need to reach. For all of these reasons, I would reverse the judgment of the district court.

I. FUNDAMENTAL RIGHTS

The majority concludes that the ordinance infringed upon the rights of both Johnson and Au France to intrastate travel, Johnson's right to assist in raising her grandchildren, and Au France's right to visit his attorney. According to the majority, each of these rights constitutes a fundamental liberty interest. I respectfully disagree. Before discussing each of these purported rights in detail,

I believe that a few general comments about substantive due process are warranted.

The Supreme Court's approach to determining whether a particular right is protected by the Fourteenth Amendment's Due Process Clause establishes the framework for my analysis:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

Washington v. Glucksberg, 521 U.S. 702, 720-21, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997) (internal quotation marks and citations omitted); *see id.* at 728 (holding that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause").

This need for a "careful description of the asserted fundamental liberty interest" appears repeatedly in the Supreme Court's decisions involving substantive due process. In *Glucksberg,* for example, the Court was faced with a challenge to a prohibition on physician-assisted suicide. The Court expressly rejected framing the issue in terms of whether individuals have "a liberty interest in determining the time and manner of one's death," "a right to die," "a liberty to choose how to die," or "a right to control of one's final days." *Id.* at 722 (internal quotation

marks omitted). Instead, the Court explained that "the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." *Id.* at 723.

The Supreme Court similarly rejected broad definitions of the asserted liberty interest in *Reno v. Flores,* 507 U.S. 292, 315, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993), where it upheld the constitutionality of regulations promulgated by the Immigration and Naturalization Service that addressed the circumstances and terms under which detained juvenile aliens could be released pending their deportation hearings. In particular, the Court framed the issue in terms of "the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Id.* at 302. This language, rather than an asserted liberty interest in "the freedom from physical restraint," or "the right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives," constituted the "careful description of the asserted right" that is necessary in the substantive-due-process analysis. *Id.* (internal quotation marks omitted).

In addition to emphasizing the significance of the definition of the asserted fundamental interest implicated in a particular case, the Supreme Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights,* 503 U.S. 115, 125, 117 L. Ed. 2d 261,

112 S. Ct. 1061, (1992); *see also Moore v. City of East Cleveland,* 431 U.S. 494, 502, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (plurality opinion) (noting that "substantive due process has at times been a treacherous field for this Court"). The Court has explained the reason for this hesitation as follows:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court. *Glucksberg,* 521 U.S. at 720 (internal quotation marks and citation omitted). I believe that this court, like the Supreme Court, must proceed with caution before expanding previously recognized liberty interests to encompass situations that have not yet been encountered.

A. Right to intrastate travel

As the majority recognizes, the Supreme Court has described the contours of the right to travel as follows:

> The "right to travel" discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz v. Roe, 526 U.S. 489, 500, 143 L. Ed. 2d 689, 119 S. Ct. 1518 (1999). Noticeably absent from this passage is a recognition of any right to *intrastate* travel. *See generally Mem'l Hosp. v. Maricopa County,* 415 U.S. 250, 255-56, 39 L. Ed. 2d 306, 94 S. Ct. 1076 (1974) (declining to decide whether a constitutional distinction exists between interstate and intrastate travel).

Moreover, the Supreme Court explicitly differentiated between these two types of travel in *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 122 L. Ed. 2d 34, 113 S. Ct. 753 (1993). The plaintiffs in *Bray* alleged that, by obstructing access to abortion clinics, the defendants violated 42 U.S.C. § 1985(3) by interfering with the plaintiffs' right to interstate travel. *Bray,* 506 U.S. at 266-67. In holding that the plaintiffs failed to show a conspiracy to violate their federal rights, the Court explained that the defendants' proposed demonstrations would not implicate the right to interstate travel because the record established that the defendants' actions would have restricted only intrastate travel:

> As far as appears from this record, the only "actual barriers . . . to movement" that would have resulted from petitioners' proposed demonstrations would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another. Such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them.

Id. at 276-77 (alteration and emphasis in original). This language strongly suggests that no fundamental right to intrastate travel exists.

After acknowledging that the Supreme Court has not explicitly recognized a right to intrastate travel, the majority concludes that the "right to travel locally through public spaces and roadways" is a fundamental liberty interest. (Maj. Op. at 21) Unlike the majority, however, I believe that this court's opinion in *Wardwell v. Board of Education of Cincinnati,* 529 F.2d 625 (6th Cir. 1976), held that the right to intrastate travel is not entitled to heightened constitutional protection.

The plaintiff in *Wardwell* challenged the constitutionality of the Board of Education's rule that required all teachers in the Cincinnati school system to reside within the city school district. *Id.* at 626. Wardwell argued that the residency requirement infringed upon his right to intrastate travel. *Id.* at 627. This court rejected his argument, concluding that the relevant Supreme Court decisions had dealt only with interstate travel. *Id.* ("We find no support for plaintiff's theory that the right to intrastate travel has been afforded federal constitutional protection."). Equally important, this court held that "where, as in the present case, a *continuing* employee residency requirement affecting at most the right of intrastate travel is involved, the 'rational basis' test is the touchstone to determine its validity." *Id.* at 628 (footnote omitted) (emphasis in original).

The majority in the present case interprets *Wardwell* to have established that the Supreme Court's travel holdings (1) "applied only to interstate travel" and (2) "did not prohibit a school district's residency requirement."

(Maj. Op. at 14) I have no quarrel with the majority's analysis of *Wardwell's* treatment of the relevant Supreme Court cases. But I disagree with the majority's conclusion that *Wardwell* did nothing more than determine that the Supreme Court's right-to-travel cases were not applicable to the residency requirement imposed by the Cincinnati Board of Education.

Instead, I believe that *Wardwell's* holding that the rational-basis test applies to determine the constitutionality of a law affecting intrastate travel is necessarily based upon the conclusion that only the right to interstate travel, not the ability to travel within a single state, is a fundamental liberty interest entitled to heightened constitutional protection. *See Hutchins v. Dist. of Columbia,* 338 U.S. App. D.C. 11, 188 F.3d 531, 537-38 (D.C. Cir. 1999) (en banc) (citing *Wardwell* for the proposition that the Sixth Circuit has rejected a fundamental right to intrastate travel). If the right to intrastate travel had been a fundamental liberty interest, this court would have been required to apply strict scrutiny, rather than the rational-basis standard of review that was in fact used, to evaluate the constitutionality of the residency requirement.

The majority acknowledges that "a prior published opinion of this court is binding unless either an intervening decision of the United States Supreme Court requires modification of the prior opinion or it is overruled by this court sitting en banc." *United States v. Roper,* 266 F.3d 526, 530 (6th Cir. 2001). Neither of these events has occurred since *Wardwell* was decided. I therefore believe that *Wardwell* prohibits us from reconsidering the issue of whether the right to intrastate travel, or the "right to travel locally through public spaces and roadways" as it is phrased by the majority, is a fundamental liberty interest.

Moreover, where a subsequent opinion from this court conflicts with an older one, the earlier decision remains the binding precedent. *Darrah v. City of Oak Park,* 255 F.3d 301, 310 (6th Cir. 2001) ("When a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case."). This rule requires us to adhere to *Wardwell,* even if the court in *Kuhnle Brothers, Inc. v. County of Geauga,* 103 F.3d 516, 521-22 (6th Cir. 1997), believed (erroneously in my opinion) that the question of whether the right to intrastate travel is entitled to heightened constitutional protection was still unresolved in this circuit.

Wardwell thus refutes the plaintiffs' argument that the ordinance infringed upon a fundamental right to freedom of movement in intrastate travel. As a result, I respectfully disagree with the majority's conclusion that the right to intrastate travel is a fundamental liberty interest entitled to heightened constitutional protection.

B. Freedom of association

Both plaintiffs also claim that the ordinance infringed upon their freedom of association, allegedly because it interfered with their abilities to maintain intimate, interpersonal relationships. Johnson contends that, as a grandmother, she has a right to visit and assist in the raising of her grandchildren. Au France, on the other hand, claims that the ordinance interfered with his right to associate with the attorney of his choice and to meet with charitable organizations that help provide for his essential needs. The plaintiffs seek to derive these rights from the First Amendment's guarantee of freedom of

association and from the substantive component of the Due Process Clause of the Fourteenth Amendment.

Unlike the majority, I do not believe that the ordinance interfered with the plaintiffs' freedom of *intimate association,* a right that is protected by the Due Process Clause. The majority does not address whether the ordinance infringed upon the plaintiffs' freedom of *expressive association,* a right protected by the First Amendment. Nevertheless, because the plaintiffs mention both the First and the Fourteenth Amendments in their complaint, I will consider below each potential source of constitutionally protected associational rights.

1. First Amendment right to freedom of association

Although the plaintiffs' complaint alleges that the ordinance interfered with their interpersonal relationships, the freedom of association guaranteed by the First Amendment has a more narrow focus. *Roberts v. United States Jaycees,* 468 U.S. 609, 618, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984) (noting that "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion"). The thrust of the plaintiffs' freedom-of-association challenge – that the ordinance interfered with their abilities to maintain interpersonal relationships – does not relate to these First Amendment rights. As a result, I am of the opinion that the First Amendment does not provide protection for participating in the relationships sought by the plaintiffs.

In reaching this conclusion, I recognize that Au France's inability to visit his attorney's office during his exclusion from Over the Rhine presents a closer question. Au France seeks to derive from the First Amendment a right to associate with the particular attorney of his choice in order to challenge the alleged violations of his legal rights. Although this asserted right is related to Au France's desire to "petition the Government for a redress of grievances," U.S. Const. amend. I, the pertinent Supreme Court cases addressing the interplay between the First Amendment's guarantees and the right to meet with an attorney all deal with the rights of organizations and their members. *See, e.g., United Mine Workers of Am. v. Illinois State Bar Ass'n,* 389 U.S. 217, 221-22, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967) (holding that the union's members had a First Amendment right to hire an attorney collectively to assist them in asserting their legal claims); *Bhd. of R.R. Trainmen v. Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 8, 12 L. Ed. 2d 89, 84 S. Ct. 1113, 27 Ohio Op. 2d 365, 94 Ohio Law Abs. 33 (1964) (holding that the First Amendment protected the Brotherhood's right to maintain a Department of Legal Counsel that referred the Brotherhood's members and their families to attorneys); *NAACP v. Button,* 371 U.S. 415, 428-29, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963) (holding that the First Amendment protected the right of the NAACP to recommend attorneys to prospective litigants seeking legal redress for the alleged violations of their rights).

None of these cases support the recognition of a First Amendment right to associate with a particular attorney. Rather, *United Mine Workers* dealt with a prohibition against collectively hiring an attorney, and both *Brotherhood of Railroad Trainmen* and *Button* involved laws

proscribing particular methods of referring clients to attorneys. The Supreme Court, moreover, has noted that the First Amendment interest at stake in cases such as *Brotherhood of Railroad Trainmen* "was primarily the right to associate collectively for the common good." *Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 335, 87 L. Ed. 2d 220, 105 S. Ct. 3180, (1985).

Even if the First Amendment were deemed to protect a person's right to associate with a particular attorney, I would find that the ordinance did not infringe upon that right. Au France, for example, was free to meet with his attorney, Bernard Wong, away from Wong's office, speak with Wong on the telephone, and communicate with Wong through the mail. The majority expresses the view that such possibilities are meaningless for a homeless man who has no telephone or permanent address. But I believe that it stretches credulity to find that Wong and Au France would have been unable to meet at a coffee shop, a bookstore, or a public library convenient to both of them.

For all of these reasons, I conclude that the ordinance did not interfere with any First Amendment right that Au France might have to associate with a particular attorney.

2. Fundamental liberty interest in maintaining intimate personal relationships

The plaintiffs' assertion that the ordinance infringed upon their fundamental right to form and maintain basic, intimate personal relationships has its foundation in the importance of these relationships in the nation's democratic system of government. As the Supreme Court has explained,

> choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984). The Court proceeded to observe that the relationships that most clearly merit protection under the Fourteenth Amendment "are those that attend the creation and sustenance of a family – marriage, childbirth, the raising and education of children, and cohabitation with one's relatives." *Id.* at 619 (citations omitted). These relationships, the Court noted, involve unique characteristics that distinguish them from other forms of association:

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationships.

Id. at 619-20.

The record, as the majority notes, establishes that Johnson helped care for her grandchildren and regularly took two of them to school. Because her grandchildren lived in Over the Rhine, however, Johnson was unable to

continue these activities after receiving her exclusion notice. Johnson could have obtained a variance if she had been able to establish that she resided with her children in Over the Rhine, but she never applied for such a variance.

Confronted with these facts, the majority concludes that Johnson has "a fundamental freedom of association right to participate in the upbringing of her grandchildren." (Maj. Op. at 27) I disagree. The key Supreme Court case of *Moore v. City of East Cleveland,* 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977), in my view, not only fails to support Johnson's asserted associational right, but also suggests that no such right exists. In *Moore,* a plurality of the Supreme Court held that a city ordinance that limited occupancy of single dwelling units to members of one family, and defined "family" in such a manner that prevented a grandmother from living with her grandchildren, violated the grandmother's fundamental liberty interest in being able to live with them. *Id.* at 505-06. The plaintiff in *Moore* was a grandmother who lived with her son and two grandsons. Only one of the grandsons was the child of the son living in the house; the other was the child of the son's sibling. This living arrangement violated the city's housing ordinance. *Id.* at 496-97.

Throughout the plurality opinion in *Moore,* the Court emphasized the family and family living arrangements, not the rights of a grandparent to visit grandchildren. *See Ellis v. Hamilton,* 669 F.2d 510, 513 (7th Cir. 1982) (concluding that the Court in *Moore* "was concerned with the impact on the family unit as a whole – that is, with the interests of the child as well as of the grandparent"). In explaining why rational-basis review was not appropriate, for instance, the Court noted that the ordinance "selects certain categories of relatives who may live together and

declares that others may not," thereby "slicing deeply into the family itself," and that it "intrudes on choices concerning *family living arrangements.*" *Moore,* 431 U.S. at 498-99 (emphasis added).

The Court in *Moore* also framed the contours of the liberty interest at issue before it by emphasizing that "the tradition of uncles, aunts, cousins, and especially grandparents *sharing a household* along with parents and children has roots equally venerable and equally deserving of constitutional recognition as those of the nuclear family." *Id.* at 504 (emphasis added). Finally, the Court recognized that "decisions concerning child rearing, which *Yoder, Meyer, Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives *who occupy the same household* – indeed who may take on major responsibility for the rearing of the children." *Id.* at 505 (emphasis added).

The federal courts of appeals that have considered the contours of the liberty interest recognized in *Moore* have expressed a reluctance to extend it beyond grandparents living with their grandchildren. *See Brown v. Ives,* 129 F.3d 209, 211 (1st Cir. 1997) (noting that cases raising the possibility of grandparents having "some constitutionally protected rights in relation to their association with their grandchildren" involve grandparents residing with their grandchildren, and that the rights of nonresident grandparents "have an even slimmer pedigree in the case law"); *Watterson v. Page,* 987 F.2d 1, 8 n.6 (1st Cir. 1993) (recognizing that "the scope and level of constitutional protection for the liberty interests of grandparents probably differs from that for parents' interests," but holding that grandparents who reside with their grandchildren have

"interests at least sufficient to avoid dismissal of their § 1983 claims on grounds they have no constitutionally protected right at stake"); *Ellis v. Hamilton,* 669 F.2d 510, 513 (7th Cir. 1982) (holding that a grandmother had due process rights in associating with her grandchildren where she acted *in loco parentis* to the children, claimed to have formal custody of the children when the defendants took them from her, and was "a great-aunt, an adoptive grandmother, and a *de facto* mother and father all rolled up into one") (italics in original).

Moreover, in *Troxel v. Granville,* 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), a plurality of the Supreme Court held that, as applied to the facts before it, a state law permitting "any person" to petition a state court for the right to visit a child, and authorizing the court to grant such rights whenever "visitation may serve the best interest of the child," unconstitutionally interfered with the fundamental right of a mother to raise her own children. *Id.* at 60, 75. *Troxel* involved the state court's decision to allow grandparents visitation rights that exceeded the parent's preference. *Id.* at 71. Although the Court acknowledged the potential desirability of parents fostering strong relationships between grandparents and their grandchildren, it emphasized that "the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance." *Id.* at 70.

Unlike the present case, *Troxel* involved a conflict between the desires of the parent and those of the grandparents. The plurality opinion nonetheless implicitly questions whether grandparents have a fundamental liberty interest in being able to visit their grandchildren. To be sure, the lack of any discussion of the grandparents'

interest may be due to the holding that the trial judge unconstitutionally infringed on the mother's right to raise her children by refusing to give the mother's interest any special weight. *Id.* at 72. But the fact that grandparents were seeking visitation rights, combined with the Court's analysis of the statute as applied to the case before it, accentuates the absence of even a passing acknowledgment of any fundamental right that grandparents might have to visit their grandchildren. I therefore believe that *Troxel* not only distinguishes between the rights of a parent as opposed to a grandparent to raise children and grandchildren, but also casts serious doubt on Johnson's asserted liberty interest.

For these reasons, I conclude that nonresident grandparents lack a fundamental legal right to visit their grandchildren. In reaching this conclusion, I recognize the valuable role that grandparents often play in the lives of their grandchildren. But parents retain the fundamental right to raise their own children. Where grandparents reside with their grandchildren, as was the case in *Moore,* the circumstances are such that recognizing the grandparents' right to live in that household is a logical outgrowth of relevant Supreme Court precedent. Recognizing the right to visit grandchildren as a fundamental liberty interest, in contrast, represents an expansion of previously recognized fundamental rights and presents the risk of imposing this court's policy preferences in the guise of the Due Process Clause. *Washington v. Glucksberg,* 521 U.S. 702, 720, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997).

The preceding discussion explains why I believe that noncustodial grandparents lack a fundamental legal right to visit their grandchildren. Agreeing with this principle, the majority recognizes that if the issue were a purported

right to visit grandchildren rather than a right to participate in their education and rearing, we would be bound by the holding in *Thompson v. Ashe,* 250 F.3d 399, 407 (6th Cir. 2001), that "Thompson has no fundamental right to visit his family members on [the public housing authority's] property." (Maj. Op. at 26-27) But the majority nevertheless concludes that Johnson has a fundamental right to visit her grandchildren in order to assist in their upbringing.

In support of its position, the majority relies upon both *Moore* and a series of Supreme Court cases recognizing that *parents or guardians* have a fundamental right "to direct the education and upbringing of one's children." *Glucksberg,* 521 U.S. at 720; *see also M.L.B. v. S.L.J.,* 519 U.S. 102, 106, 136 L. Ed. 2d 473, 117 S. Ct. 555 (1996) (recognizing that "choices about . . . the upbringing of children are among associational rights this Court has ranked as of basic importance in our society") (internal quotation marks omitted). None of the pertinent Supreme Court cases, however, involve the right of *nonresident grandparents* to contribute to the raising of their grandchildren. *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35, 69 L. Ed. 1070, 45 S. Ct. 571 (1925) (holding that Oregon's requirement that all children between the ages of 8 and 16 attend public schools "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska,* 262 U.S. 390, 400-01, 67 L. Ed. 1042, 43 S. Ct. 625 (1923) (holding that a Nebraska statute restricting the instruction of foreign languages violated the fundamental right of parents to engage a teacher to instruct their children in those languages). *Moore,* as noted above, focused on the possibility that grandparents who live with

their grandchildren might assist in raising them, but it did not address the rights of a nonresident grandparent.

Johnson neither lived with nor acted as the guardian of her grandchildren. The relationship that she had with her grandchildren is therefore distinguishable from the situations that actually existed or were contemplated in *Moore, Pierce, Meyer,* and the other cases upon which the majority relies. Moreover, nothing in the ordinance prevented Johnson from maintaining continuing contact with her grandchildren. They could meet outside Over the Rhine, communicate on the telephone, and correspond through the mail. Johnson could therefore continue to participate in the upbringing of her grandchildren, the very right that the majority identifies as the fundamental associational right at issue in the present case. The fact that such participation became less convenient during her exclusion is not a factor in determining whether Johnson's asserted right is a fundamental liberty interest.

As for Au France, he contends that the right "to enter into and maintain certain intimate human relationships," *Roberts v. United States Jaycees,* 468 U.S. 609, 617, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984), protects his right to associate with his chosen attorney and with supportive persons and organizations in Over the Rhine. The majority find this argument persuasive. I disagree.

In *Roberts,* the Supreme Court held that a state law requiring the Jaycees to accept women as members did not violate the male members' constitutional rights of free speech and association. *Id.* at 623-29. Although the law infringed on the members' right of expressive association, the Court concluded that the state offered compelling interests to justify the interference and that the law was

the least restrictive means for achieving those goals. *Id.* The Court also held that the law did not infringe on the members' freedom of intimate association, because the Jaycees lacked the characteristics necessary for this type of constitutional protection to apply. *Id.* at 620-21. As the Court explained, the reason for recognizing a constitutional right to form certain intimate relationships is that they provide "emotional enrichment" to the lives of the persons involved. *Id.* at 619 ("The constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others."). "Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* The examples of such intimate relationships given by the Court "are those that attend the creation and sustenance of a family – marriage, childbirth, the raising and education of children, and cohabitation with one's relatives." *Id.* (citations omitted).

Although the attorney-client relationship shares many of the characteristics of families, including "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship," I reject the notion that these traits alone are sufficient to justify finding that "freedom of association as an intrinsic element of personal liberty" attaches to the attorney-client relationship. *Id.* at 620. Neither a client nor an attorney are typically seeking "emotional enrichment" from their association. Nor does the relationship contribute to a client's ability to define his or her identity. Furthermore, the tie between an attorney and his or her client does not represent the "kinds of personal bonds [that] have played a critical role in the

culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs. . . . " *Id.* at 618-19.

The preceding analysis of the attorney-client relationship is even more applicable to associations between individuals and charitable organizations. Although a recipient and the provider of social services may develop close ties, the relationship is by no means necessarily one of intimacy. Emotional enrichment and self-development, moreover, are not the primary goals or products of these associations.

For all of these reasons, I conclude that the ordinance did not interfere with Au France's Fourteenth Amendment right to freedom of association.

II. RATIONAL BASIS REVIEW

In addition to not infringing upon the plaintiffs' fundamental rights, the ordinance did not involve any suspect classifications. As a result, the ordinance is constitutional so long as it is "rationally related to legitimate government interests." *Washington v. Glucksberg,* 521 U.S. 702, 728, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997) (explaining the applicable standard for reviewing a law that does not involve a fundamental liberty interest); *Thompson v. Ashe,* 250 F.3d 399, 407 (6th Cir. 2001) (applying rational basis review to a policy that limited individuals' mobility but did not affect fundamental rights or involve suspect classifications).

The majority recognizes that the City's goal of eradicating the blight of drug-infested neighborhoods constitutes a compelling governmental interest. (Maj. Op. at 29-30) This purpose in enacting the ordinance necessarily

satisfies the more lenient test of being a legitimate interest. Moreover, preventing individuals who are arrested for or convicted of committing drug offenses in drug-exclusion zones from entering those neighborhoods is, in my view, rationally related to achieving the City's interest. *See Thompson,* 250 F.3d at 407 (concluding that banning individuals who have criminal histories from entering the public housing authority's premises was rationally related to the goal of suppressing and preventing crime on the premises). I am therefore of the opinion that the ordinance would have survived rational basis review.

III. DOUBLE JEOPARDY

The plaintiffs' final argument, which the majority had no reason to address, is that the ordinance violated the Double Jeopardy Clause of the Fifth Amendment. This clause "protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." *Monge v. California,* 524 U.S. 721, 727-28, 141 L. Ed. 2d 615, 118 S. Ct. 2246 (1998). According to the plaintiffs, the sanctions imposed by the ordinance are so punitive that they amount to extra-judicial punishment, rather than a remedial civil effort by the City to rehabilitate neighborhoods that experience disproportionately high rates of drug-abuse crimes.

Determining whether a particular punishment is criminal or civil for purposes of the Double Jeopardy Clause first requires an examination of the legislation that imposes the sanction at issue. *Hudson v. United States,* 522 U.S. 93, 99, 139 L. Ed. 2d 450, 118 S. Ct. 488 (1997) ("Whether a particular punishment is criminal or civil is,

at least initially, a matter of statutory construction."). The first step in this inquiry is to determine "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Id.* (internal quotation marks omitted).

Even if the legislature indicates its desire to establish a civil penalty, a second step in the analysis is necessary. A court must determine "whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Id.* (internal quotation marks and citation omitted) (alternation in original). The Supreme Court has identified seven factors that "provide useful guideposts" for answering this question:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter;* (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Id.* at 99-100 (alteration and italics in original) (quoting *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963)).

Because these factors "may often point in differing directions," no single factor is dispositive. *Mendoza-Martinez,* 372 U.S. at 169 (1963). The Supreme Court has also determined that "these factors must be considered in relation to the statute on its face," not in connection with

individuals affected by the allegedly civil penalty. *Id.* Finally, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson,* 522 U.S. at 100 (internal quotation marks omitted).

Neither party disputes that the ordinance was intended to be a civil remedy. The ordinance labels the restrictions that follow an arrest or conviction for a drug offense committed in a drug-exclusion zone as a "civil exclusion." C.M.C. § 755-5. Furthermore, the ordinance provides that its purpose is to advance the City's interest in "restoring the quality of life and protecting the health, safety, and welfare of citizens using the public ways" in neighborhoods with high incidents of drug-related offenses. Cincinnati, Ohio, Ordinance No. 229-1996, § 1(D) (Aug. 7, 1996). We can therefore proceed to the second step in order to determine whether the plaintiffs meet the high burden necessary to establish that the ordinance in fact constituted a criminal penalty under the above-stated factors.

With regard to the first factor, the ordinance clearly limits the freedom of movement of persons arrested or convicted for drug-related offenses that occur in exclusion zones. The City relies upon *Hudson* for the proposition that excluding someone from a limited geographic area is not "an affirmative disability or restraint." In *Hudson,* the Supreme Court held that being barred from the banking profession is not a criminal penalty. *Hudson,* 522 U.S. at 105. The Court rejected the argument that the sanctions involved an "affirmative disability or restraint," noting that "[w]hile petitioners have been prohibited from further participating in the banking industry, this is certainly nothing approaching the infamous punishment of

imprisonment." *Id.* at 104 (internal quotation marks omitted).

Contrary to the City's position, I do not believe that this language supports the conclusion that an "affirmative disability or restraint" occurs only where a person faces imprisonment or confinement. Instead, it simply recognizes that imprisonment is the clearest example of a restraint. The Supreme Court in *Mendoza-Martinez* and subsequent cases could have easily used the term "imprisonment" if it had intended to limit the first factor to that sanction. I therefore conclude that being banned from a drug-exclusion zone constitutes a form of restraint, albeit not of the most extreme type. The first factor thus provides a modicum of support for the plaintiffs' argument that the ordinance imposed a criminal penalty. Because the restraint is far from the "infamous punishment of imprisonment," however, this factor, in my view, is not entitled to overwhelming weight.

To support their position that the second factor – the historical treatment of the sanction – is indicative of a criminal penalty, the plaintiffs contend that the ordinance effectively banished persons from Over the Rhine. The plaintiffs are correct that banishment has historically been regarded as a punishment. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 474, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977) (recognizing that banishment is a punishment commonly included as one of the "pains and penalties" proscribed by Article I, § 9 of the Constitution, which prohibits Bills of Attainder); *Mendoza-Martinez,* 372 U.S. at 169 n.23 (stating that "forfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment").

Equating the ordinance's ninety-day and one-year exclusions with banishment, however, is problematic, because the ordinance provided for variances to individuals who reside in or who are employed by a lawful business located in an exclusion zone. Registered social service agencies, moreover, could grant variances to individuals whom they assist. As a result, I do not believe that the ordinance's temporary exclusions were equivalent to what has been historically recognized as a form of punishment. Furthermore, although both the plaintiffs and the district court considered the particular circumstances of Johnson and Au France, *Hudson* instructs that the inquiry should be limited to the face of the statute. *Hudson,* 522 U.S. at 100. The ordinance in question, when viewed as a whole, provided for the temporary exclusion of individuals who were arrested or convicted of a drug-related crime from designated high-crime neighborhoods, and it allowed for variances to prevent interference with such a person's residence, employment, or ability to obtain crucial social services. Under these circumstances, I conclude that this sanction did not constitute a penalty that "has historically been regarded as a punishment."

The third *Mendoza-Martinez* factor requires a determination of whether the sanction "comes into play only on a finding of scienter." Because exclusion notices could be given to individuals arrested for drug crimes without any finding of *mens rea,* criminal intent is not required to impose the sanction. This factor favors the City's position that the exclusion is a civil sanction rather than a criminal punishment.

With regard to the fourth factor, which focuses on whether the sanction serves a retributive or deterrent purpose, even the City concedes that the ordinance would

have a deterrent effect. Deterrence, in fact, was the very purpose of the ordinance. But the likely deterrence "is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals." *Hudson,* 522 U.S. at 105 (internal quotation marks omitted). Moreover, the existence of the variances counters any suggestion that the ordinance was designed as a means of retribution. I therefore find that this factor, although somewhat helpful to the plaintiffs, does not weigh heavily in their favor.

The fifth factor – "whether the behavior to which [the sanction] applies is already a crime" – does not support a conclusion that the ordinance imposed criminal penalties. Exclusion occurred only if a person was arrested or convicted of a drug offense in a drug-exclusion zone. In contrast, the criminal laws that such a person violated apply regardless of where the crime is committed. The particular behavior to which the ordinance applied, defined in this manner, was not a separate crime. Equally important, the fact that both criminal penalties and the ordinance's sanctions could be imposed for the same underlying drug offenses was insufficient to make the exclusion criminally punitive. *Hudson,* 522 U.S. at 105 (noting that a sanction is not necessarily punitive simply because the conduct for which it is imposed is also a criminal offense); *United States v. Ward,* 448 U.S. 242, 249-51, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980) (holding that the imposition of a fine for violations of the Federal Water Pollution Control Act was a civil penalty even though the behavior to which the sanction applied was already a crime, noting that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission") (internal quotation marks omitted).

The plaintiffs concede that the sixth factor, which requires asking "whether an alternative purpose to which [the sanction] may rationally be connected is assignable for it," does not support a conclusion that the ordinance imposed criminal sanctions. In particular, the City enacted the ordinance in an attempt to improve the quality of life within drug-exclusion zones and to protect the health, safety, and welfare of its citizens in those neighborhoods. This purpose is rationally related to the ordinance's sanction of exclusion.

Finally, in considering the seventh factor's focus on comparing the nature of the sanctions to the civil purpose or the ordinance, I do not find the exclusions excessive in relation to the legitimate governmental goals involved. As noted above, the potentially harsh effects of the ordinance are mitigated through the availability of variances.

The preceding analysis demonstrates that only the first and fourth factors – which focus upon whether the sanction involves an affirmative disability or restraint and whether the penalty serves a retributive or deterrent purpose – support a finding that the exclusion is a criminal punishment. But neither of these considerations provides especially strong support for the plaintiffs' position. All of the other factors lead to the conclusion that the ordinance was not "so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson,* 522 U.S. at 99 (internal quotation marks and citations omitted) (alteration in original). I thus conclude that the plaintiffs have failed to sustain their high burden of presenting "the clearest proof" that the ordinance was a criminal penalty notwithstanding its designation by the City as a civil remedy. *Id.* at 100. As a result, the ordinance's sanctions

did not violate the Double Jeopardy Clause. I would therefore reverse the judgment of the district court on this issue.

IV. CONCLUSION

The City of Cincinnati, as the majority recognizes, faces difficult challenges in its efforts to enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of its citizens in those areas. In my opinions, the ordinance was a constitutionally permissible means to reach that goal. I therefore respectfully dissent.

119 F. Supp.2d 735

PATRICIA JOHNSON, et al., Plaintiffs, v.
CITY OF CINCINNATI, Defendant.

Case No. C-1-98-441

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

119 F. Supp. 2d 735; 2000 U.S. Dist. LEXIS 19713

January 20, 2000, Filed

DISPOSITION:

Plaintiff's Motion for Summary Judgment GRANTED and Defendant's Motion for Summary Judgment DENIED. Plaintiff's Motion for Preliminary Injunction DENIED AS MOOT.

COUNSEL:

For PATRICIA JOHNSON, plaintiff: Scott T Greenwood, Greenwood & Associates, Cincinnati, OH.

For PATRICIA JOHNSON, MICHAEL AU FRANCE, plaintiffs: Bernard F Wong, Cincinnati, OH.

For PATRICIA JOHNSON, plaintiff: Robert Hugh Gutzwiller, Clodfelter & Gutzwiller, Cincinnati, OH.

For PATRICIA JOHNSON, plaintiff: Joan M Englund, Cleveland, OH.

For CINCINNATI CITY OF, defendant: Richard Ganulin, Assistant City Solicitor, Cincinnati, OH.

JUDGES:

Susan J. Dlott, United States District Judge.

OPINION BY:

Susan J. Dlott

OPINION:

ORDER

This matter is before the Court on Plaintiffs' Motion for Summary Judgment (doc. 14), Plaintiff's Motion for Preliminary Injunction (doc. 15), and Defendant's Motion for Summary Judgment (doc. 17). Plaintiffs Patricia Johnson and Michael Au France filed this suit against Defendant City of Cincinnati challenging the constitutionality of Cincinnati's "drug exclusion zone" ordinance, Chapter 755 of the Cincinnati Municipal Code ("C.M.C."). The parties have agreed to submit the Motion for Preliminary Injunction and the Motions for Summary Judgment on the briefs. Upon consideration of the facts and the law, Plaintiff's Motion for Summary Judgment (doc. 14) is hereby GRANTED and Defendant's Motion for Summary Judgment (doc. 17) is hereby DENIED. Consequently, Plaintiff's Motion for Preliminary Injunction (doc. 15) is DENIED AS MOOT.

I. BACKGROUND

A. Chapter 755 of the Cincinnati Municipal Code

Chapter 755 of the C.M.C., the drug exclusion zone ordinance, went into effect in September 1996 and was modified in part in July 1999. In enacting the ordinance, City Council made express findings that certain areas of the city, including the neighborhood known as Over the Rhine, have "significantly higher incidence of conduct associated with drug abuse activity than other areas of the

City." City of Cincinnati Ordinance No. 229 at ¶ 1(A). The Council also found that "many persons arrested in Cincinnati for drug abuse frequently return to the same location or general vicinity of their arrest because the area has proven to be a lucrative place for drug-abuse activity." *Id.* at ¶ 1(B). The Council then found that Cincinnati "has a substantial and compelling interest in restoring the quality of life and protecting the health, safety, and welfare of citizens using the public ways in such areas." *Id.* at ¶ 1(D). Finally, the Council found that Cincinnati's interest was so great "it justifies excluding those who engage in illegal drug abuse or illegal drug abuse-type criminal activity." *Id.* at ¶ 1(F).

The ordinance bans persons from all drug exclusion zones who are arrested or taken into custody within any designated drug exclusion zone "for drug abuse or any drug abuse-related activities," including nine specified criminal statutes of the Ohio Revised Code. C.M.C. § 755-5.[1] Persons arrested are subject to exclusion for a period of ninety days following the arrest and for a period of one year following subsequent convictions for the drug-abuse related crime. *Id.* The July 1999 amendment clarifies that the ninety day civil exclusion terminates "upon the dismissal of the charges, acquittal of the person excluded, or the failure to prosecute." *Id.* as amended. Persons who have been excluded and who are then found within a drug exclusion zone are subject to immediate arrest for criminal

[1] The sections cited are those as numbered in the City of Cincinnati, Ordinance No. 229-1996. The subsection numbers are not consistent in the version provided in the official Cincinnati Municipal Code. The two versions are identical except for the subsection numbering.

trespass under Ohio Revised Code § 2911.21, a fourth degree misdemeanor. *Id.*

The Cincinnati City Council is authorized to designate drug exclusion zones, defined as areas "where the number of arrests for crimes listed in § 755-5 and other drug-abuse related crimes for the 12 month period preceding the original designation is significantly higher than that for other similarly situated/sized areas of the city." C.M.C. § 755-1. To date, the only designated drug exclusion zone is the neighborhood of Over the Rhine. Over the Rhine is located immediately north of the Cincinnati downtown business district and the area includes Hamilton County office buildings, professional offices – including the office of Bernard Wong, counsel for the Plaintiffs – commercial businesses, and personal residences.

Persons arrested for the drug-abuse related activities are to be served with an exclusion notice detailing the areas designated as drug exclusion zones and explaining the person's right to appeal his or her exclusion. C.M.C. § 755-9. Excluded persons have a right to appeal the exclusion in writing to the city's safety director within five days of receiving the exclusion notice. C.M.C. § 755-11(1)(a). The safety director or his/her designee hears the appeals. *Id.* The city has the burden to show by a preponderance of the evidence that the excluded person violated one of the crimes enumerated in § 755-5. C.M.C. § 755-11(1)(c). Prior to the hearing, the safety director or the designate must inform the excluded person of, among other things, the general nature of the hearing, the type of evidence to be used and the procedure for objections, that a record will be kept, and whether the city will be represented by an attorney. C.M.C. § 755-13(E). Excluded persons may be represented by counsel at the appeal,

witnesses may testify, parties have the right to cross-examine witnesses and present rebuttal evidence, and irrelevant evidence is excluded. C.M.C. § 755-13(F) & (G).

Excluded persons have the right to apply for a variance from the chief of police, or his/her designee, for "reasons related to the health, welfare, or well-being of the person excluded, or for drug abuse-related counseling services." C.M.C. § 755-11(2)(b). Social service agencies providing services within the drug exclusion zone can also issue variances if they have rules prohibiting drug-abuse and they have entered into a written agreement with the police department. *Id.* Excluded persons can also apply to the chief of police, but not to social service agencies, for variances if the persons are bona fide residents of the drug exclusion zones, or if the persons are bona fide owners or employees of places of lawful employment in the drug exclusion zones. *Id.*[2] Persons who are transient occupants of hotels or motels are not bona fide residents for purposes of qualifying for variances. *Id.*

B. The Plaintiffs

Plaintiff Patricia Johnson was arrested for marijuana trafficking on March 18, 1998 in Over the Rhine. As a result, she was excluded from Over the Rhine from March 24, 1998 to June 22, 1998. She did not appeal her exclusion within five days of her drug arrest. The case against

[2] The Court notes that Chapter 755 uses permissive language in describing the variances for health and welfare variances, but mandatory language for the residency and employment variances. § 755-11(2)(b).

Plaintiff Johnson was terminated on March 27, 1998 after the grand jury ignored the charge against her. Johnson's exclusion occurred prior to the amended version of Chapter 755, and thus, there was no provision for terminating her exclusion from Over the Rhine after the charges were dropped. On April 8, 1998 Plaintiff Johnson was arrested for criminal trespass for being present in Over the Rhine. The City of Cincinnati later dismissed the charges against Plaintiff for the criminal trespass in violation of Chapter 755. It was not until July 1999 that Chapter 755 was amended to terminate a civil exclusion "upon the dismissal of the charges, acquittal of the person excluded, or the failure to prosecute."

Plaintiff Johnson was not a bona fide resident of Over the Rhine, nor a business owner or employee of an Over the Rhine business at the time of her drug-abuse activity arrest. She did not qualify, therefore, for a variance. Plaintiff Johnson did have family members, including her daughter, Marquisa Harmon, and grandchildren, living in Over the Rhine at the time of her initial arrest and during her civil exclusion. Plaintiff Johnson averred that she assisted Harmon in taking care of Harmon's children. It was criminal trespass for Plaintiff Johnson to assist her daughter or her grandchildren in their Over the Rhine home during the period of her exclusion.

Plaintiff Michael Au France was first arrested in Over the Rhine for a drug-related crime, convicted, and consequently excluded from Over the Rhine in October 1996. He was subsequently arrested multiple times for criminal trespass in violation of Chapter 755 and for additional drug abuse-related crimes in Over the Rhine from late 1996 through the present. It is estimated he has spent over 100 days in jail for his Chapter 755 trespass arrests.

Plaintiff Au France is homeless, but he has regularly sought food, clothing, and shelter from relief agencies, including Gospel Mission, located in Over the Rhine. As a homeless person, Plaintiff does not qualify as a bona fide resident of Over the Rhine under Chapter 755. Plaintiff Au France applied for a variance from Chapter 755 in November 1998, but his application was denied. Au France averred that he was told by the police that his variance was denied because he had too many arrests. As noted above, Plaintiffs' counsel, Bernard Wong, works in Over the Rhine. Until the parties stipulated to the Court on September 2, 1999 that the City would not cite Plaintiff Au France for violations of Chapter 755 pending the Court's ruling on the Motion for Preliminary Injunction, Plaintiff's exclusion made it criminal trespass for him to visit his attorney.

C. Procedural History

On June 19, 1998, Plaintiff Johnson filed the instant action against Defendant City of Cincinnati alleging that her exclusion from Over the Rhine pursuant to Chapter 755 violated her civil rights including her First Amendment rights of association and freedom of speech, her Fourteenth Amendment rights of due process and equal protection, freedom of movement, and her right to travel. Plaintiff Johnson sought damages and an injunction permanently enjoining enforcement of Chapter 755. Plaintiffs filed an Amended Complaint on December 18, 1998 adding Au France as a Plaintiff and alleging that the enactment and enforcement of Chapter 755 deprived Au France of his rights to be free from cruel and unusual punishment and double jeopardy.

Subsequently, on July 22, 1999, Plaintiffs moved for summary judgment on all claims. On August 3, 1999 Plaintiffs moved for a declaration that Chapter 755 is unconstitutional and a preliminary injunction enjoining Defendant from enforcing Chapter 755. Plaintiffs also seek compensatory damages, costs, and attorney's fees pursuant to 42 U.S.C. § 1988. Defendant City opposed Plaintiffs' Motions and filed its own Motion for Summary Judgment as to all claims on August 27, 1999.

II. LEGAL STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). On a motion for summary judgment, the movant has the burden of showing that no genuine issue of material fact exists, and the evidence, together with all inferences that can permissibly be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). On those issues for which it shoulders the burden of proof, the moving party must make a showing that is "'sufficient for the court to hold that no reasonable trier of fact could find other than for

the moving party.'" *Calderone v. United States,* 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 487-88 (1984)) (emphasis omitted). For those issues where the moving party will *not* have the burden of proof at trial, the movant must "point [ ]out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325.

In responding to a summary judgment motion, the nonmoving party may not rest upon the pleadings but must go beyond the pleadings and "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The nonmoving party "must set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e). If the defendant moves for summary judgment based on the lack of proof of a material fact, "the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient" to overcome the summary judgment motion. *Anderson,* 477 U.S. at 252. Thus, "if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

III. ANALYSIS

Plaintiffs move for preliminary injunction and for summary judgment on a multitude of grounds including that Chapter 755 violates their rights of freedom of movement, freedom to travel, and freedom of association, and that Chapter 755 constitutes double jeopardy. On the basis

that Chapter 755 violates rights alleged to be fundamental, Plaintiffs argue that the City must establish that Chapter 755 can withstand strict scrutiny review. That is, the City must demonstrate that Chapter 755 is narrowly tailored to achieve a compelling interest. *See Miller v. Johnson,* 515 U.S. 900, 920, 132 L. Ed. 2d 762, 115 S. Ct. 2475 (1995). Defendant City, conversely, argues that exclusion is a form of seizure and its constitutionality must be determined under the reasonableness standard of the Fourth Amendment to the United States Constitution.

The Court will proceed by examining if exclusion under Chapter 755 can be properly analyzed as a seizure and if the reasonableness test of the Fourth Amendment is applicable. Then the Court will examine whether Chapter 755 implicates any of Plaintiffs' fundamental rights, thus necessitating application of the strict scrutiny test. The Court will then determine if Chapter 755 withstands constitutional scrutiny under the correct standard of review. The Court will also examine if Chapter 755 implicates double jeopardy concerns.

A. Fourth Amendment

The primary thrust of Defendant City's arguments can be summarized by quoting a passage from one of Defendant's memoranda:

> The logic is easy. It is known that the government may constitutionally detain an arrestee in its custody and control if public safety requires the detention. *A fortiori,* the government may constitutionally exclude an arrestee from a high drug crime area if public safety requires the exclusion. The exclusion is part of the seizure of an arrestee and the exclusion has been documented

> by Cincinnati City Council and designed to protect public safety and preserve the quality of specified high drug crime City neighborhoods.

City of Cincinnati's Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment and Plaintiffs' Motion for Preliminary Injunction, p. 1.

The Court is troubled by Defendant's characterization of the issue in this case. First, the Court believes there is a fundamental difference between a pretrial detainment of an arrestee and an exclusion pursuant to Chapter 755. Defendant's focus seems to be exclusively on the constitutionality of the ninety day exclusion following arrest and not on the constitutionality of the one year exclusion following a conviction or plea of guilty. The government undoubtedly has the right to detain an arrestee under certain circumstances. The propriety of such a decision is properly examined under the Fourth Amendment. However, different constitutional concerns may also come into play when the arrestee is released from detainment pending trial. Having decided to release the arrestee or convicted person, the government cannot continue to argue that the person has no more rights than a seized person. The Court does not believe that an arrestee released upon bond or a convicted person released from prison or on probation with restrictions on their liberty is being seized in the same way a person in detention is seized.[3]

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[3] The Court notes that the government restricts the absolute freedom of movement of all persons in ways that clearly do not equate

(Continued on following page)

Second, Defendant's position assumes that it is a function of the City's law-making body, the City Council, to determine the detention status of a class of arrestees. The Court believes it is a function of the courts to determine on a case-by-case basis if an individual is to be detained, what restrictions on personal liberty an arrestee should face upon release, and what restrictions a convicted person should face upon probation or supervised release. The Supreme Court has held that "the Fourth Amendment requires a *judicial* determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh,* 420 U.S. 103, 114, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975) (emphasis added). Similarly, a federal district court stated that a "state *court* clearly has the right to restrict the travel of convicted individuals within its jurisdiction." *Jones v. Evans,* 932 F.Supp. 204, 207 (N.D. Ohio 1996) (emphasis added). Further, the Ohio Revised Code assigns to the courts the authority to set bail for arrestees and to impose sentences upon a conviction of a crime. *See, e.g.,* Ohio Rev. Code §§ 2935.15 and 2937.23 (bail); Ohio Rev. Code § 2929.01 et seq. (penalties and sentencing); Ohio Rev. Code § 2951.01 et seq. (probation). Importantly, these decisions regarding detentions and restrictions of liberty are determined on an individual-by-individual basis. The Court concludes that the City

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to governmental seizure. For example, access to certain governmental property as varied as military bases, office buildings, and nature preserves may be restricted to authorized personnel. The fact that a majority of persons are denied access to those areas does not mean that those persons have been seized by the government. Access to use roadways and waterways is also heavily regulated, but not in a way that the restriction of absolute personal freedom constitutes a seizure.

Council usurped judicial authority when it attempted to regulate the status of a class of arrestees and convicted persons.[4]

Finally, the cases cited by Defendant City in support of its argument that Chapter 755 should be governed by the Fourth Amendment without reference to other constitutional concerns are inapposite. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993), concerned government seizure of real property, not the liberty rights of persons arrested or convicted of certain drug crimes. Moreover, the Supreme Court in *James Daniel* rejected the proposition that the Fourth Amendment is the sole constitutional provision in question when the government seizes property subject to forfeiture. *See id.* at 49-50.

Two other cases cited by Defendant City, *Albright v. Oliver,* 510 U.S. 266, 273, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994), and *County of Sacramento v. Lewis,* 523 U.S. 833, 118 S. Ct. 1708, 1715, 140 L. Ed. 2d 1043 (1998), support the proposition that if the Fourth Amendment explicitly provides constitutional protection against a particular government behavior, then the Fourth Amendment, and not generalized notions of substantive due process, must be the guide in analyzing the claims. However, neither case is instructive in determining whether Chapter 755 exclusion should be analyzed under the Fourth Amendment.

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[4] The Court expresses no opinion as to whether a trial court, in appropriate circumstances, could restrict the right of an individual arrestee or convict from entering an area known for high incidents of drug-abuse.

For all these reasons, the Court finds that Defendant City has not provided persuasive authority that the constitutionality of Chapter 755 should be determined as a Fourth Amendment concern pursuant to a reasonableness standard.

B. Freedom of Association

Plaintiffs argue that exclusion from Over the Rhine pursuant to Chapter 755 infringed upon their constitutional right to freedom of association. The right to freedom of association is not enumerated in the Constitution, but arises as a necessary concomitant to the Bill of Right's protection of individual liberty. The Supreme Court has explained the protections afforded by the freedom of association as follows:

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984) (holding that a state discrimination law which had the effect of requiring the Jaycees to admit women did not violate the freedom of association). The Supreme Court added that the freedom to associate "plainly presupposes a freedom not to associate." *Id.* at 623.

The Court finds that exclusion pursuant to Chapter 755 implicated Plaintiffs' right to freedom of association of the first type. The first type of association claim recognizes that the Bill of Rights "must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 618. The Supreme Court gives as examples of protected relationships: marriage (*Zablocki v. Redhail,* 434 U.S. 374, 383-86, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978)), childbirth (*Carey v. Population Servs. Int'l,* 431 U.S. 678, 684-86, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977)), and cohabitation with relatives (*Moore v. East Cleveland,* 431 U.S. 494, 503-04, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1997) (plurality opinion)). *See id.* The Supreme Court characterized these relationships as ones where persons share "not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." 468 U.S. at 620.

Plaintiff Johnson, upon her arrest in Over the Rhine for one of the enumerated drug crimes, was issued an exclusion notice. As a result of her exclusion from Over the Rhine, it became a criminal act for her to enter Over the Rhine for the purpose of spending time with her family. It became criminal trespass for her to assist her daughter in raising her grandchildren or to walk her granddaughters from their home in Over the Rhine to their school. This is

precisely the type of "highly personalized relationship" the Supreme Court recognized deserved substantial protection from governmental interference. *See Roberts,* 468 U.S. at 618.

Similarly, the Court believes that the right to freedom of association described in *Roberts* is broad enough to encompass Plaintiff Au France's relationship with persons in Over the Rhine. Plaintiff Au France, a homeless man, does not have family in Over the Rhine. However, he receives governmental and charitable assistance from institutions located in Over the Rhine. Although variances may be issued to bona fide permanent residents and to persons seeking health, welfare, or well-being assistance, *see* C.A.C. § 755-11(2)(b), Plaintiff Au France applied for such a variance and was denied.

Moreover, Plaintiff Au France's attorney in this matter maintains an office in Over the Rhine. The attorney-client relationship is one in which individuals share the most personal aspects of their lives. The attorney-client relationship is "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Roberts,* 468 U.S. at 620. The law protects confidentiality and sanctity of the attorney-client relationship. It is difficult to conceive of more "intimate human relationships [which] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme" than attorney-client relationships. *Id.* at 617. Even if the right to freedom of association is not implicated by denying Plaintiff Au France access to the social services he, as a homeless person, relies upon to fulfill his basic human

needs, it is clearly implicated by denying him access to his attorney at his attorney's place of business.

The Court has determined that the Plaintiffs' fundamental right to freedom of association was implicated when they were legally excluded from Over the Rhine pursuant to Chapter 755. The right to freedom of association is not absolute, however, and the issue becomes whether Chapter 755 violated the Plaintiffs' right to freedom of association under the appropriate standard of review. Statutes that infringe upon the constitutionally protected right to freedom of association must be struck down unless they are narrowly tailored to serve compelling state interests. *See Washington v. Glucksberg,* 521 U.S. 702, 720-21, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997).

Again, Defendant City argues in defense of the constitutionality of the ordinance that Chapter 755 implicates only Fourth Amendment concerns and only must satisfy the reasonableness standard. In the event that the Court chose to subject Chapter 755 to strict scrutiny review, Defendant City points out that the Supreme Court has held that the government has a compelling interest in preventing additional crimes by arrestees. *See United States v. Salerno,* 481 U.S. 739, 749, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). The Court has carefully examined *Salerno* and finds that on balance it does not support Defendant's argument that Chapter 755 withstands strict scrutiny review.

Salerno concerned the constitutionality of the pretrial detention of arrestees. *See id.* at 741. The statute at issue in *Salerno,* the Bail Reform Act of 1984, allowed federal judges to authorize the pretrial detention of an arrestee if the government demonstrated by clear and convincing

evidence that the arrestee presented a danger to the community if released. *See id.* The Court finds important distinctions between the Bail Reform Act and Chapter 755. First, the Bail Reform Act recognized that it is the responsibility of the judiciary to authorize detention of the arrestee. Second, the Bail Reform Act called for the federal judges to make case-by-case determinations of detention based upon individual circumstance. Chapter 755 attempts to restrict the liberty of a class of arrestees. Chapter 755 usurps the judicial authority to determine on an individual basis what restrictions of liberty an arrestee or convict should face.

Finally, the Bail Reform Act was narrowly tailored. The government could detain arrestees awaiting trial only if it were shown by clear and convincing evidence that "no release conditions '[would] reasonably assure . . . the safety of any other person and the community.'" *Id.* (quoting 18 U.S.C. § 3141 et seq. (1982 ed., Supp. III)). The Act was narrowly tailored in that it did not apply to a class of persons, but only to those for whom a high standard of proof of dangerousness had been met. The Court is not persuaded that Chapter 755 is similarly narrowly tailored.

The stated goals of Chapter 755 include restoring the quality of life and protecting the health, safety, and welfare of citizens, and preventing the harmful effects of illegal drug abuse. *See* City of Cincinnati, Ordinance No. 229. Explicit in the City's statement of its goals is the City's belief that persons arrested or convicted for drug-abuse related crimes in Over the Rhine will repeatedly return to the area and repeat their criminal activities. *See id.* The Court agrees with Defendant that the City has a compelling interest in preventing drug abusers from repeating their criminal drug abuse in neighborhoods

struggling to improve safety and the quality of life of their residents. Chapter 755, however, is not narrowly tailored to achieve those goals.

Defendant City argues that the ordinance is narrowly tailored in that it applies only to a specified class of arrested and convicted persons, only to a specified area, and only for a limited period of time. It argues that exclusion is supported by data provided by the Cincinnati Police Department and by the alleged success of the analogous City of Portland ordinance upon which Chapter 755 is based. Finally, they argue that the variances and opportunity for pre-exclusion hearings make it narrowly tailored.

The Court cannot agree with Defendant's arguments. Chapter 755 criminalizes the status of being in Over the Rhine for persons arrested or convicted of drug-related crimes in a drug-exclusion zone. Such persons can be arrested for criminal trespass regardless of the nature or purpose of their actions within the Over the Rhine neighborhood. C.A.C. § 755-5. The Supreme Court struck down an analogous vagrancy statute aimed at preventing future crimes in *Papachristou v. City of Jacksonville,* 405 U.S. 156, 169, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972). The Supreme Court stated that a "direction by the legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster [and that a] vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest." *Id.* In much the same way, Chapter 755 is unconstitutional in that it allows the police to arrest a person for criminal trespass when the person has otherwise committed no crime.

A narrowly tailored ordinance would not authorize the arrest of a grandmother who entered Over the Rhine for the purpose of seeing her grandchildren. A narrowly tailored ordinance would not authorize the arrest of a homeless person who entered Over the Rhine to obtain food, shelter, and clothing from relief agencies. Nor would it prevent any person from meeting with his or her attorney at the attorney's place of business. A narrowly tailored ordinance would not authorize exclusion without, at a minimum, a finding that the particular person to be excluded was likely to repeat his crime in Over the Rhine.

The City could achieve its stated goals in ways that did not so greatly impinge upon the Plaintiffs' fundamental right to association. The City could authorize more funds and more police officers to patrol neighborhoods like Over the Rhine which seem to suffer from a higher incidence of drug-abuse. Similarly, the City could help organize neighborhood watches and help establish counseling services for drug offenders. Courts could be authorized to issue tougher sentences to those convicted of enumerated drug-abuse offenses. In short, establishing drug exclusion zones is not a narrowly tailored means to achieve the City's compelling interests.

For the above stated reasons, the Court declares that Chapter 755 of the Cincinnati Municipal Code is unconstitutional as applied to Plaintiffs in that it violates their right to freedom of association.

C. Freedom of Movement/Right to Travel

Plaintiffs also argue that Chapter 755 impinges on their fundamental right to intrastate travel, or stated another way, right to freedom of movement. Defendant

City's response is that arrestees do not have the same right to freedom of movement as non-arrestees may have. Again, Defendant City argues that Chapter 755 should be examined under Fourth Amendment reasonableness. Before discussing whether Chapter 755 impinges upon Plaintiffs' right to intrastate travel or freedom of movement, the Court must define those rights.

The Supreme Court has repeatedly recognized the right to *interstate* travel as a fundamental right which can be impinged upon only if the state has a compelling interest and the statute is narrowly tailored to that interest. *See e.g., Attorney General of New York v. Soto-Lopez,* 476 U.S. 898, 901-02, 90 L. Ed. 2d 899, 106 S. Ct. 2317 (1986); *Memorial Hosp. v. Maricopa Cty.,* 415 U.S. 250, 254, 39 L. Ed. 2d 306, 94 S. Ct. 1076 (1974). The Sixth Circuit, however, has not afforded the same protection to intrastate travel. *Wardwell v. Board of Educ.,* 529 F.2d 625, 627 (6th Cir. 1976). Instead, at least in the context of continuing employee residence requirements affecting only *intrastate* travel, the Sixth Circuit stated that a rational basis test should be used to test a statute's validity. *See id.* at 628. In a more recent case, the Sixth Circuit expressly refused to assert an opinion on the question of intrastate travel and left the issue for the district court to decide. *See Kuhnle Bros., Inc. v. County of Geauga,* 103 F.3d 516, 522 (6th Cir. 1997) (discussing a ban on through truck travel on county roads).

The Supreme Court has not specifically defined *intrastate* travel as a fundamental right, but it has not denied it either. *See Memorial Hosp.,* 415 U.S. at 255-56. A strong case can be made in favor of finding intrastate travel, in the guise of freedom of movement, to be a fundamental right. The Supreme Court has, in the context of

discussing the right to travel outside the country, used strong language that would imply a fundamental right to freedom of movement:

> Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.

Kent v. Dulles, 357 U.S. 116, 125, 2 L. Ed. 2d 1204, 78 S. Ct. 1113 (1958) (analyzing constitutionality of a regulation that denied passports).

The right to freedom of movement was confirmed in *Kolender v. Lawson,* 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983), a case involving a statute that made loitering a misdemeanor if the loiterers refused to identify themselves and account for their presence when requested to do so by a peace officer. The Court stated that the statute implicated the right to freedom of movement, but struck down the statute on the grounds that it was unconstitutionally vague on its face. *See id.* at 358, 361. More recently, three Justices in a divided Supreme Court opinion agreed that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment . . . [and] this right to remove from one place to another according to inclination [is] an attribute of personal liberty protected by the Constitution." *Chicago v. Morales,* 527 U.S. 41, 119 S. Ct. 1849, 1857, 144 L. Ed. 2d 67 (1999) (Stevens, J., joined by Souter, Ginsburg, JJ.) (citations and quotations omitted).

Some circuit and district courts have recognized a constitutional right to freedom of intrastate travel. *See e.g., Spencer v. Casavilla,* 903 F.2d 171 (2d Cir. 1990). The Middle District of Pennsylvania has recognized that "the rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others are basic values 'implicit in the concept of ordered liberty' protected by the due process clause of the fourteenth amendment." *Bykofsky v. Borough of Middletown,* 401 F. Supp. 1242, 1254 (M.D. Penn. 1975). In another case, the Southern District of Florida found that a city ordinance that authorized the arrest of homeless persons for being in public places impermissibly burdened the persons' fundamental right to intrastate travel. *See Pottinger v. City of Miami,* 810 F. Supp. 1551, 1579-81 (S.D. Fla. 1992); *but see Tobe v. City of Santa Ana,* 9 Cal. 4th 1069, 892 P.2d 1145, 1164-65 (Cal. 1995) (applying only a rational basis standard to a similar statute that had "indirect or incidental burdens on travel resulting from otherwise lawful governmental action"). Other courts have expressly disavowed a constitutional fundamental right to travel. *See e.g., Wright v. City of Jackson,* 506 F.2d 900, 901 (5th Cir. 1975).

Upon consideration of the above mentioned authorities, the Court holds that there is at least a limited fundamental right to intrastate travel in the form of a right to freedom of movement. The fact that the Sixth Circuit expressly disavowed such a fundamental right in the context of continuing employee residence requirements, *see Wardwell,* 529 F.2d at 627-28, does not mean there is not a more generalized right to freedom of movement, *see Morales,* 119 S. Ct. at 1857 (Stevens, J., joined by Souter,

Ginsburg, JJ.); *Kolender,* 461 U.S. at 358; *Kent,* 357 U.S. at 125; *Bykofsky,* 401 F. Supp. at 1254.

Finally, the Court wishes to make clear that the fact that Plaintiffs are persons who have been arrested for or convicted of an underlying drug-abuse crime does not somehow diminish the fundamental nature of this right. In so holding, this Court is at odds with the statement of law from the Northern District of Ohio that for persons convicted of crimes, "the right to travel is not unrestricted. . . . The court policy [of allowing house arrest only for those individuals who live within a twenty-five mile radius of the house arrest office] will result in a denial of equal protection if it fails 'in rationally furthering legitimate state ends.'" *Evans,* 932 F. Supp. at 207. The Northern District of Ohio court based this statement of law on the Supreme Court case of *Jones v. Helms,* 452 U.S. 412, 69 L. Ed. 2d 118, 101 S. Ct. 2434 (1981).

Helms concerned a Georgia statute which made it a misdemeanor for a parent to wilfully abandon his or her child, but a felony to abandon his or her child and then leave the state. *See* 452 U.S. at 414 n.2. The Supreme Court in *Helms* recognized the fundamental right to interstate travel. *See id.* at 418. It then recognized that this right to travel could be restricted in the case in which a person has been convicted of a crime:

> Despite the fundamental nature of this right, there nonetheless are situations in which a State may prevent a citizen from leaving. Most obvious is the case in which a person has been convicted of a crime within a State. [A person convicted of a crime] may be detained within that State and returned to it if he is found in another State. Indeed, even before trial or conviction, probable

> cause may justify an arrest and subsequent temporary detention. . . . Manifestly, a person who has committed an offense against the laws of Georgia may be stopped at its borders and temporarily deprived of his freedom to travel elsewhere within or without the State.

Id. at 419 (footnotes omitted). The Supreme Court then held that "although a simple penalty for leaving the State is plainly impermissible," the statute at issue was permissible because leaving the state merely "aggravated the consequences of conduct that is otherwise punishable." *Id.* at 422.

Unlike the conclusion the *Evans* court apparently reached, this Court does not read *Helms* as standing for the proposition that persons who commit crimes have no fundamental right to travel. *Helms* only stated that such persons' right to travel could be restricted. The implication this Court draws from *Helms* is that the Supreme Court recognized that in some instances the state may have a compelling interest in preventing criminals from leaving their jurisdiction and that the Georgia statute at issue was narrowly tailored to achieve this goal. Moreover, Chapter 755 is distinguishable in a fundamental aspect from the Georgia statute in *Helms*. Chapter 755 does not merely enhance the penalty, under certain circumstances, for conduct that is already punishable. It turns conduct that is otherwise legal – being in Over the Rhine – into criminal trespass.

The right to intrastate travel, in the guise of freedom of movement outlined above, is implicated by Chapter 755 because it denies a class of arrested and convicted persons, like the Plaintiffs, the right to enter the Over the Rhine neighborhood for lawful purposes. If the right to freedom

of movement is implicated in anti-loitering statutes, *see Kolender,* 461 U.S. at 358, and in a nighttime juvenile curfew statute, *see Bykofsky,* 401 F. Supp. 1242 at 1254, then it is implicated in this ordinance that makes it a criminal trespass for persons arrested or convicted of the enumerated drug abuse crimes to enter Over the Rhine.

The ultimate issue then becomes whether Chapter 755 violates the right to freedom of intrastate travel, that is, freedom of movement, by failing to be narrowly tailored to a compelling government interest. The Court agrees with Defendant City that improving the quality of life in neighborhoods by preventing repeat drug offenders from violating drug abuse laws time and time again is a compelling interest. The problem, as discussed above in the section on freedom of association, is that Chapter 755 is not narrowly tailored to achieve this goal.[5]

In so concluding, this Court disagrees with the recent opinion of the Court of Appeals for the First Appellate District of Ohio, *Ohio v. Burnett*, 1999 Ohio App. LEXIS 6216, No. C-981003, slip op. at 4-5 (Hamilton Cty. Ct. App. Dec. 23, 1999). The Ohio appellate court held that Chapter 755 did not violate the constitutional right to travel under either a rational basis analysis or strict scrutiny. *See id.* This Court believes that the Ohio appellate court failed to

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[5] The Third Circuit in *Lutz v. City of York,* 899 F.2d 255 (3d Cir. 1990), found that there is a fundamental right to intrastate travel, but applied only intermediate constitutional scrutiny. *See id.* at 269-70. The court held that the statute at issue would be upheld "it is narrowly tailored to meet significant city objectives." *Id.* at 270. The distinction is not relevant here because the Court holds that Chapter 755 is not narrowly tailored to achieve Cincinnnati's stated interests and thus cannot survive strict scrutiny or intermediate review.

give sufficient consideration to the fact that persons convicted of drug crimes may have innumerable lawful reasons to enter Over the Rhine. Chapter 755 classifies conduct that clearly ought to be legal as criminal trespass.

For the above stated reasons, the Court declares that Chapter 755 of the Cincinnati Municipal Code is unconstitutional on its face and as applied to Plaintiffs in that it violates the right of excluded persons to freedom of movement.

D. Double Jeopardy

In a different vein than their substantive due process arguments, the Plaintiffs argue that exclusion from Over the Rhine pursuant to Chapter 755 constitutes criminal punishment. If true, it would constitute double jeopardy to convict and punish a person for the underlying drug offense after issuing the ninety day exclusion notice to him or her. Similarly, it would constitute double jeopardy to issue the one year exclusion notice to a person who has been convicted and sentenced for the underlying drug offense. Defendant City argues strenuously that Chapter 755 authorizes civil exclusion only, and that civil exclusion is not punishment for purposes of double jeopardy analysis.

The Constitution provides that "No person . . . [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This double jeopardy clause protects against only the imposition of multiple criminal punishments for the same offense. *See Hudson v. United States,* 522 U.S. 93, 118 S. Ct. 488, 493, 139 L. Ed. 2d 450 (1997). The critical issue in determining whether the prohibition against double jeopardy applies to

Cincinnati's exclusion ordinance is whether the exclusion is a criminal or civil punishment. The Supreme Court has provided a two step process to make this determination. *See* 118 S. Ct. at 493 (citing *United States v. Ward,* 448 U.S. 242, 248, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980)). First, a court must employ statutory construction and examine whether the punishment was expressly or impliedly intended to be criminal or civil. *See id.* Second, even if the legislative body intended a civil penalty, courts must examine "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Ward,* 448 U.S. at 248-49.

The Supreme Court stated that the following factors from *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963), were useful guideposts in making the second determination:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it historically has been regarded as a punishment; (3) whether it comes into play only upon a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; (7) whether it appears excessive in relation to the alternative purpose assigned.

Hudson, 118 S. Ct. at 493 (internal quotations omitted). These factors are to be examined "in relation to the statute on its face." *Id.* As for the fourth criteria, the Supreme Court has recognized that all civil penalties will have some deterrent effect. *See id.* at 494. The Supreme Court has

cautioned that "'only the clearest proof'" is sufficient to strike down a statute as unconstitutional on this ground. *Ward,* 448 U.S. at 249 (quoting *Flemming v. Nestor,* 363 U.S. 603, 617, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960)).

The Court of Appeals of Oregon has examined the Portland exclusion ordinance upon which Chapter 755 is based and concluded that the ninety day exclusion following the arrest for an enumerated drug abuse crime was only a civil, and not a criminal, punishment. *See State v. James,* 159 Ore. App. 502, 978 P.2d 415, 421 (Or. Ct. App. 1999). The Oregon court explicitly noted that it was not considering the issue of whether the one year exclusion following conviction constituted criminal punishment. *See* 978 P.2d at 416 n. 1. The court found that a limited period duration could not be likened to a banishment which is traditionally criminal punishment, noting specifically that the Portland ordinance did not require the loss of one's residence or employment. *See id.* at 419. The court further found that the exclusion served civil deterrence goals and that it was not retributive. *See id.* at 420. Finally, the court found that the exclusion was not excessive in relation to its remedial purpose of improving citizens' quality of life in areas notorious for drug activity. *See id.*

The opinion of the Court of Appeals of Oregon is not binding on this Court, and this Court will examine the Cincinnati ordinance de novo. Applying the first prong of the *Ward/Hudson* analysis, the Court employs statutory construction to determine if the punishment was expressly or impliedly intended to be criminal. City of Cincinnati Ordinance No. 229, codified at C.M.C. Chapter 755, expressly intends for exclusion to be a civil remedy. Its express purpose is not to punish the excluded drug abuse offenders, but rather to "restore the quality of life and

protect[ ] the health, safety and welfare of citizens using the public ways in areas" which have a "significantly higher incidence of conduct associated with drug abuse than other areas of the City." City of Cincinnati Ordinance No. 229.

Therefore, the question becomes whether Chapter 755 "is so punitive either in purpose or effect as to negate" the express intention of a civil remedy. *Ward,* 448 U.S. at 248-49. Stated another way, the Court must ask if Chapter 755 is punitive in the sense that it twice punishes a drug abuser for the same offense. *See Cutshall v. Sundquist,* 193 F.3d 466, 473 (6th Cir. 1999). Using the *Mendoza-Martinez* factors as guideposts, the Court holds that Chapter 755 is so punitive in effect that it negates the City's intent.

First, the Court finds that exclusion involves an affirmative restraint. It is a restraint against the liberty of those arrested or convicted for the drug-abuse crimes. Second, the Court disagrees with *James* and finds that exclusion is analogous to banishment, a penalty historically regarded as punishment. *See Nixon v. Administrator of General Servs.,* 433 U.S. 425, 474, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977) (stating that banishment is historically considered to be punishment); *Mendoza-Martinez,* 372 U.S. at 169 n.23 (same). Although Chapter 755 seeks to lessen this punitive aspect by creating variances for bona fide residents and bona fide business owners and employees, the variances are of no help to a homeless person like Plaintiff Au France. He was stripped of his primary resources for seeking food, shelter, and clothing when he was excluded from Over the Rhine. Moreover, Chapter 755 prevents excluded persons, like Plaintiffs, from seeking lawful employment or permanent residence in an area of

the City with which they may be intimately familiar. The Court does not believe the fact that exclusion is for a limited time, while traditional banishment was permanent, significantly diminishes the punitive aspect.

Turning to the other factors, Chapter 755 does not require a finding of a criminal mens rea to impose the punishment. Chapter 755 presumably will have a deterrent effect, although the Court recognizes that civil penalties may have a deterrent effect also. *See Hudson,* 118 S. Ct. at 494. Finally, even though Chapter 755 has a civil rationale, and as was discussed at length above, exclusion has a punitive effect which exceeds its stated purpose to improve the quality of life in Over the Rhine.

Upon examination of the ordinance as a whole, and taking into consideration the *Mendoza-Martinez* factors as guideposts, the Court believes that it has the "clearest proof" that exclusion pursuant to Chapter 755 constitutes criminal punishment. *Ward,* 448 U.S. at 249 (discussing "clearest proof" standard). The Court holds, therefore, that Chapter 755 of the Cincinnati Municipal Code violated Plaintiff Au France's constitutional right to be free from double jeopardy in that it allowed him to be both punished for the underlying drug charges and excluded from Over the Rhine.[6]

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[6] Technically, double jeopardy never arose as to Plaintiff Johnson because the grand jury did not issue an indictment against her as to the underlying drug charge.

IV. CONCLUSION

For the foregoing reasons, the Court declares Chapter 755 Cincinnati Municipal Code to be unconstitutional as applied to Plaintiffs in that it violates their fundamental right of freedom of association, and as applied to Plaintiff Au France in that exclusion constitutes criminal punishment which resulted in a violation of the double jeopardy prohibition. The Court also declares Chapter 755 unconstitutional on its face and as applied in that it violates excluded persons' fundamental right to freedom of movement. The Court, therefore, enjoins enforcement of Chapter 755. Finally, the Court reserves the issue of compensatory damages and attorney's fees and costs for determination at a later date.

IT IS SO ORDERED.

Susan J. Dlott

United States District Judge

00-4477

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA JOHNSON, ET AL., Plaintiffs-Appellees,	)	ORDER
v.	)	(Filed Jan. 2, 2003)
CITY OF CINCINNATI, Defendant-Appellant.	)	

BEFORE: MARTIN, Chief Judge; GILMAN, Circuit Judge; and EDMUNDS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is

* Hon. Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

denied. Judge Gilman would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk
[illegible]

Doc. #199601603

City of Cincinnati M.C.V.

An Ordinance No. 229 – 1996

MODIFYING the provisions of Title VII, General Regulations, of the Cincinnati Municipal Code, by ordaining new Chapter 755, Drug-Exclusion Zones, which provides for the use of 90-day and one-year exclusions in designated drug-exclusion zones in the City of Cincinnati, establishes procedures and designates the initial drug-exclusion zone.

WHEREAS, certain areas of the City have a significantly higher incidence of conduct associated with drug abuse than other areas of the City; and

WHEREAS, the concentration of drug abuse activity contributes to the degradation of those areas and also adversely affects the overall quality of life for those areas' residents, businesses, and visitors; and

WHEREAS, the City has a substantial and compelling interest in restoring the qualify of life and protecting the health, safety and welfare of citizens using the public ways in such areas; and

WHEREAS, the processes presently available were not meant to and do not adequately control the type of activity and the detrimental effects on the areas where drug-abuse activity occurs and alternative methods have been tried and proven ineffective; now, therefore,

BE IT ORDAINED by the Council of the City of Cincinnati, State of Ohio:

Section 1. That Council hereby finds and determines that:

A. Certain areas of the City have a significantly higher incidence of conduct associated with drug abuse activity than other areas of the City. This concentration of illegal drug abuse activity contributes to the degradation of those areas and which also adversely affects the overall quality of life for those areas residents, businesses, and visitors.

B. Many persons arrested in Cincinnati for drug abuse frequently return to the same location or general vicinity of their arrest because the area has proven to be a lucrative place for drug-abuse activity.

C. After arresting persons for illegal drug abuse and/or related crimes, police officers frequently encounter the same persons shortly thereafter in the same area, engaging in the same criminal activity.

D. The city has a substantial and compelling interest in restoring the quality of life and protecting the health, safety, and welfare of citizens using the public ways in such areas. The government has a substantial and compelling interest in allowing the public to use and enjoy the facilities in such areas without interference arising from illegal drug abuse and/or illegal drug abuse related crimes.

E. The processes presently available were not meant to, and do not adequately control this type of activity and the detrimental effects on the areas where it occurs. Alternative methods have been tried and have proven ineffective.

F. Individuals have a significant private interest in being able to travel and associate freely in all areas of the city. However, the public interest in preventing the harmful effects of illegal drug abusers is so great that it justifies

excluding those who engage in illegal drug abuse or illegal drug abuse-type criminal activity, for 90 days from impacted areas in which they have engaged in or attempted to engage in illegal drug abuse-related activities. Upon conviction, it having been established in a court of law that the person is a part of the larger problem of illegal drug-abuse related activity in the City, the public interest mandates that the person be excluded for a period of one (1) year from the affected areas.

G. The City's health, safety and welfare would best be served by temporarily excluding from impacted areas those persons who are arrested therein for illegal drug abuse or illegal drug abuse-related activity.

H. To minimize the likelihood of erroneous deprivation, the City should provide persons who are arrested therein for illegal drug abuse or illegal drug abuse-related activity an opportunity to quickly challenge their exclusions and have a timely hearing before a quasi-judicial official before their exclusion from the drug-exclusion zone to preserve their health or well-being.

I. That this Chapter 755 is modeled after similar legislation enacted by the City of Portland, Oregon which has experienced a dramatic decrease in the crime rate in the areas affected by the legislation since the enactment of such.

Section 2. That Chapter 755, Drug-Exclusion Zones, and sections thereunder are hereby ordained to read as follows:

CHAPTER 755. DRUG-EXCLUSION ZONES.

§ 755-1. Drug-Exclusion Zones.

Drug-exclusion zones are those areas of the city as designated by the city council under Chapter 755 of this code, which are areas where the number of arrests for the crimes listed in Section 755-5 and other drug-abuse related crimes for the twelve (12) month period preceding the original designation is significantly higher than that for other similarly situated/sized areas of the city.

§ 755-3. Designation of Drug-Exclusion Zones.

If the city council designates an area meeting the criteria of Section 755-1 of this code to be a drug-exclusion zone, council shall do so by ordinance, said designation to be valid for an initial period of two (2) years. Thereafter, the council may extend the time of designation as it deems appropriate, but in no event shall the total be more than ten (10) years.

The city council may also remove the designation in the event it deems that appropriate. The removal of the designation shall be by ordinance.

§ 755-5. Civil Exclusion.

A person is subject to exclusion for a period of ninety (90) days from the public streets, sidewalks, and other public ways in all drug-exclusion zones designated in Chapter 755 if that person has been arrested or otherwise taken into custody within any drug-exclusion zone for drug abuse or any drug abuse-related activities including the following crimes:

1. Corrupting another with drugs in violation of Ohio Revised Code Section 2925.02.

2. Trafficking in drugs in violation of Ohio Revised Code Section 292503.

3. Drug abuse in violation of Ohio Revised Code Section 2925.11 (except for a minor misdemeanor violation).

4. Possessing drug abuse instruments in violation of Ohio Revised Code Section 2925.12.

5. Drug paraphernalia offenses in violation of Ohio Revised Code Section 2925.14.

6. Illegal processing of drug documents in violation of Ohio Revised Code Section 2925.23.

7. Abusing harmful intoxicants in violation of Ohio Revised Code Section 2925.31.

8. Trafficking in harmful intoxicants in violation of Ohio Revised Code Section 2925.32.

9. Offenses involving counterfeit controlled substances in violation of Ohio Revised Code Section 2925.37.

Additionally, any person arrested or otherwise taken into custody for any crimes listed above who is subsequently convicted thereof in a court of law for that offense is subject to exclusion for a one (1) year period from the date of such conviction from the public streets, sidewalk, and other public ways in all drug-exclusion zones designated in Chapter 755.

If a person excluded from a drug-exclusion zone is found therein during the exclusion period, that person is subject to immediate arrest for criminal trespass pursuant to Ohio Revised Code Section 2911.21, a misdemeanor of the fourth degree.

§ 755-7. Issuance of Exclusion Notices.

The chief of police is designated as the person in charge of the public streets, sidewalks, and public ways in drug-exclusion zones for purposes of issuing and directing the service of exclusion notices in accordance with this chapter. The chief of police may authorize employees of the police division to issue exclusion notices in accordance with this chapter.

§ 755-9. Procedures.

At the time a person is arrested within a drug-exclusion zone for any of the crimes listed in Section 755-5, the officer making such arrest may deliver to the person a written notice excluding the person from all drug-exclusion zones. The notice shall specify the areas designated as drug-exclusion zones in Section 755-15 from which that person is excluded and contain information concerning the right to appeal the exclusion notice as provided for under Section 755-11. The exclusion notice shall be personally served upon the excluded person and the person serving said notice shall make written record of such service.

§ 755-11. Appeal and Variance.

The person to whom an exclusion notice is issued shall have a right to an appeal from the issuance of the notice.

1. (a) An appeal of the exclusion must be filed, in writing, with the director of safety within five (5) calendar days of the issuance of the notice. A hearing on the appeal shall be had to the safety director or the safety director's designee, as provided in Section 755-13..

   (b) The exclusion shall not take effect during the pendency of the appeal. If no appeal is taken the exclusion shall take effect on the sixth calendar day after the issuance of the notice.

   (c) The city shall have the burden to show by a preponderance of the evidence that the exclusion is based on conduct which constitutes any of the crimes enumerated in Section 755-5. Copies of documents in its control and which are intended to be used by the city at the hearing shall be made available to the appellant at least two (2) days prior to the hearing.

2. (a) A judgment of conviction for violation of Ohio Revised Code Sections 2925.02, 2925.03, 2925.11, 2925.12, 2925.14, 2925.23, 2925.31 2925.32, 2925.37, or a determination by a court having jurisdiction of the matter, that the officer who issued the exclusion notice, at the time, had probable cause to arrest the person to whom the exclusion notice was issued for violation of such crimes, shall be *prima facie* evidence that the exclusion was based on conduct proscribed by those statutes.

(b) Variances from an exclusion may be granted at any time during the exclusion period by either the chief of police or designate or by a social service agency which provides services within the drug-exclusion zones for which the variance is granted, only for reasons relating to the health, welfare, or well-being of the person excluded, or for drug abuse-related counseling services. Only those social service agencies which have written rules and regulations prohibiting drug abuse-related activities by their clients and which have entered into a written agreement with the police division concerning the applicability and enforceability of those rules are eligible to grant variances. The chief of police shall grant a variance to any person who can establish that he or she:

I. Was a bona fide resident of the drug-exclusion zone, other than transient occupancy in a hotel or motel, prior to receipt of the exclusion notice; or

ii. Was a bona fide owner, principal or employee of a place of lawful employment located in one of the designated drug-exclusion zones.

(c) All variances shall be in writing, for a specific period and only to accommodate a specific purpose, all of which shall be stated on the variance. The person shall keep the variance on his or her person at all times the person is within the drug-exclusion zone. In the event a

person having a variance is found to be outside the scope of the terms of the variance, the variance shall immediately become void and that person is thereupon subject to arrest for trespass.

(d) In the event a person holding a variance is arrested for conduct prohibited by state or federal law involving a drug abuse-related activity, the variance shall immediate [sic] become void and that person shall be ineligible for any variance for a period of one (1) year from the date of the arrest.

§ 755-13. Procedure for Appeals.

A. Initiation of Appeal.

The request for an appeal hearing shall be in writing and shall contain either a copy of, or a full and complete description of the exclusion notice appealed from and a statement of grounds upon which it is contended that the exclusion notice is invalid, unauthorized [sic] is invalid, unauthorized, or otherwise improper, together with such other information as the safety director, or the safety director's designee, may by rule require. The safety director, or the safety director's designee, may specify and provide hearing request forms to be used by persons requesting hearings.

B. Hearings.

(a) Upon receipt of a request for hearing, the safety director or the safety director's designee, shall schedule and hold an appeal hearing within thirty (30) days after the receipt of such request.

(b) Notice of the time, date, and place of hearing shall be given to the person requesting the hearing and to the safety department. The safety director or the safety director's designee may provide by rule for the manner of providing notice to such persons which shall be either: (1) personally delivering the notice to the person appealing the exclusion notice, or (2) mailing the notice certified mail by United States mail, postage prepaid, return receipt requested addressed to the residence or business address of the person appealing.

(c) The time for hearing maybe extended by the safety director or the safety director's designee for good cause shown, upon such terms and conditions as the safety director or the safety director's designee shall deem just and appropriate.

C. Hearings Procedure.

(a) Hearings shall be conducted in accordance with the procedures set forth in this Section 755-13.

(b) With consent of all parties, the safety director or the safety director's designee may determine the matter without hearing upon the record.

(c) The safety director or the safety director's designee may sustain or vacate the exclusion notice appealed from.

D. Nature of Determination.

The determination of the safety director or the safety director's designee is a quasi-judicial

decision and is final subject only to appeal to a court of competent jurisdiction.

E. Notice; Rights; Procedure.

(a) Prior to the commencement of a contested hearing, the safety director or the safety director's designee shall inform each party to the hearing of the following matters:

(1) A general description of the hearing procedure including the order of presentation of evidence, what kinds of evidence are admissible, whether objections any [sic] be made to the introduction of evidence and what kind of objections may be made, and an explanation of the burdens of proof or burdens going forward with the evidence.

(2) That a record will be made of the proceedings and the manner of making the record and its availability to the parties.

(3) The function of the record-making with respect to the perpetuation of the testimony and evidence and with respect to any appeal from the determination or order of the safety director or the safety director's designee.

(4) Whether an attorney will represent the city in the matters to be heard and whether the parties ordinarily and customarily are represented by an attorney.

(5) The title and function of the safety director or the safety director's designee, including the effect and authority of the safety director or the safety director's designee's determination.

(6) In the event a party is not represented by an attorney, whether the party may,

during the course of proceedings, request a recess if at that point the party determines that representation by an attorney is necessary to the protection of the party's rights.

(7) Whether there exists an opportunity for an adjournment at the end of the party then determines that additional evidence should be brought to the attention of the safety director or the safety director's designee and the hearing is reopened.

(8) Whether there exists an opportunity after the hearing and prior to the final determination or order of the safety director or the safety director's designee to review and object to any proposed ruling.

(9) A description of the appeal or judicial review process from the determination or order of the safety director or the safety director's designee.

(b) The information required to be given to a party to a hearing under subsection (a) of this section may be given in writing or orally before commencement of the hearing.

(c) The failure to give notice of any item specified in subsection (a) of this section shall not invalidate any determination or order of the safety director or the safety director's designee unless on appeal from or review of the determination or order a court finds that the failure affects the substantive rights of the complaining party, in the event of such a finding, the court shall remand the matter to the safety director or the safety director's designee for a reopening of the hearing and shall direct the safety director or the safety director's designee as to what steps

shall be taken to remedy the prejudice to the rights of the complaining party.

F. Procedure.

(a) Unless precluded by law, informal disposition of any proceeding may be made, with or without a hearing by stipulation, consent order, agreed settlement, or default.

(b) Parties may elect to be represented by counsel and to respond to and present evidence, testimonial or otherwise, and argument on all issues involved.

(c) An order adverse to a party may be issued upon default only upon a prima facie case made on the record before the safety director or the safety director's designee.

(d) Testimony shall be taken upon oath or affirmation of the witness from whom received. The safety director or the safety director's designee may administer oaths or affirmations to witnesses.

(e) The record in a proceeding before the safety director or the safety director's designee shall include:

(1) All pleadings, motions, and intermediate rulings;

(2) evidence received or considered;

(3) stipulations;

(4) a statement of matters officially noticed;

(5) questions and offers of proof, objections, and rulings thereon;

(6) proposed findings, and exceptions; and

(7) any proposed, intermediate, or final order prepared by the safety director or the safety director's designee.

(f) A verbatim, written, mechanical, or electronic record shall be made on all motions, rulings, and testimony. The record shall be transcribed for the purposes of court review unless the parties to such review waive the transcript.

G. Evidence.

(a) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. Erroneous rulings on evidence shall not preclude action by the safety director or the safety director's designee on the record unless shown to have substantially prejudiced the rights of a party. All other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible. The safety director or the safety director's designee shall give effect to the rules of privilege recognized by law. Objections to evidence may be received in written form.

(b) All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to and except as provided in subsection (d) of this section, no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies of excerpts, or by incorporation by reference. The burden of presenting evidence to support a fact

or position in a contested case rests on the proponent of the fact or position.

(c) Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence.

(d) The safety director or the safety director's designee may take notice of judicially recognizable facts, and the safety director or the safety director's designee may take official notice of general, technical, or scientific facts within the specialized knowledge of city employees. Parties shall be notified at any time during the proceeding, but in any event prior to the final decision, of material officially noticed and they shall be afforded an opportunity to contest the facts so noticed.

H. Decision.

Within 48-hours from the close of the hearing the safety director or the safety director's designee shall render a decision in writing. The decision is final subject to appeal to a court of competent jurisdiction or reconsideration.

I. Petitions for Reconsideration, Rehearing.

(a) A party may file a petition for reconsideration or rehearing on a final order with the safety director or the safety director's designee within thirty (30) days after the order is mailed.

(b) The petition shall set forth the specific ground or grounds for requesting the reconsideration or rehearing. The petition may be supported by written argument.

(c) The safety director or the safety director's designee may grant a request for reconsideration if good and sufficient reason therefor appears. If the petition is granted, an amended order shall be issued.

(d) The safety director or the safety director's designee may grant a hearing petition if good and sufficient reason therefor appears. The rehearing may, be limited by the safety director or the safety director's designee to specific matters. If a rehearing is held, an amended order may be issued.

(e) The safety director or the safety director's designee, at any time, and upon a showing of due diligence, may set aside, modify, vacate, or stay any final order, or re-open any proceeding for additional hearing when necessary to prevent a clear and manifest injustice to a party or other person adversely affected by such order.

§ 753-15. Listing of Drug-Exclusion Zone.

Pursuant to Chapter 755, the following is a drug-exclusion zone:

Over-the-Rhine:

Beginning at a point in the center line of Central Parkway, said point being the point of intersection with the center line of Vine Street; thence westwardly with the center line of West Central Parkway a distance of 1394.5 feet to the point of intersection with the center line of Central Parkway; thence northwardly and northwestwardly with the center line of Central Parkway to the point of intersection with the westwardly extension of the north parcel line of Parcel 92 Plat Book 98 Page 5 HCAP; thence eastwardly

along said parcel line extended, said parcel line and said line extended to the center line of Fargo Alley; thence southwardly with said center line to the point of intersection with the westwardly extension of the north parcel line of Parcel 204 Plat Book 98 Page 5 HCAP; thence eastwardly along said parcel line extended, said parcel line and said line extended to the center line of McMicken Avenue; thence southwardly with said center line to the point of intersection with the center line of Warner Street; thence eastwardly with the center line of Warner Street to the point of intersection with the northwardly extension of the east parcel line of Parcel 43 Plat Book 97 Page 1 HCAP; thence southwardly along said parcel line extended and said parcel line and continuing along the east parcel line of Parcels 44, 45, 46 and 47 Flat Book 97 Page 1 HCAP to the north parcel line of Parcel 52 Plat Book 97 Page 1 HCAP; thence eastwardly along said parcel line to the northeast corner of said parcel; thence southwardly along the east parcel line of said parcel 52 and continuing along the east parcel line of Parcels 53, 54, 55 and 58 Plat Book 97 Page 1 HCAP to the southeast corner of said parcel 58; thence westwardly along the south parcel line of said parcel to the northeast corner of Parcel 59 Plat Book 7 age 1 HCAP; thence southwardly along the east parcel line of said parcel and continuing along the east parcel line of Parcels 60, 61, 62, 63 and 68 Plat Book 97 Page 1 HCAP to the north parcel line of Parcel 69 Plat Book 97 Page 1 HCAP; thence eastwardly along said parcel line to the northeast corner of said parcel; thence southwardly along the east parcel line of said parcel 69 to the southeast corner of said parcel; thence westwardly along the south parcel line of said parcel to the northeast corner

of Parcel 70 Plat Book 97 Page 1 HCAP; thence southwardly along the est parcel line of said parcel to the north parcel line of Parcel 221 Plat Book 97 Page 1 HCAP; thence eastwardly along said parcel line to the northeast corner of said parcel; thence southwardly along the east parcel line of said parcel 221 and continuing along the east parcel line of Parcels 75,1 and 82 Plat Book 97 Page 1 HCAP to the north parcel line of Parcel 88 Plat Book 97 Page 1 HCAP; thence eastwardly along said parcel line and continuing along the north right-of-way line of Emming Street to the point of intersection with the center line of said street; thence eastwardly with said center line to the point of intersection with the northwardly extension of the east parcel line of Parcel 10 Plat Book 97 Page 2 HCAP; thence southwardly along said parcel line extended and said parcel line to the north right-of-way line of Conroy Alley; thence eastwardly along said right-of-way line to the west parcel line of Parcel 108 Plat Book 96 Page 3 HCAP; thence northwardly along said parcel line to the northwest corner of said parcel; thence eastwardly along the north parcel line of said parcel 108 and said parcel line extended to the center line of Ravine Street; thence southwardly with said center line to the point of intersection with the center line of Klotter Avenue; thence eastwardly with the center line of Klotter Avenue to the point of intersection with the center line of Renner Street; thence southwardly and southeastwardly with the center line of Renner Street to the point of intersection with the southwestwardly extension of the northwest parcel line of Parcel 51 Plat Book 96 Page 4 HCAP; thence northeastwardly along said parcel line extended and said parcel line to the

north corner of said parcel; thence southeastwardly along the northeast parcel line of said parcel 51 and continuing along the northeast parcel line of Parcels 52, 53, and 54 Plat Book 96 Page 4 HCAP and said parcel line extended of said parcel 54 to the north corner of Parcel 73 Plat Book 96 Page 4 HCAP; thence southeastwardly along the northeast parcel line of said parcel and continuing along the northeast parcel line of Parcels 75, 76, 77 and 78 Plat Book 96 Page 4 HCAP to the northwest parcel line of Parcel 79 Plat Book 96 Page 4 HCAP; thence northeastwardly along said parcel line and continuing along the west terminus of Zier Street to the north right-of-way line of said street; thence eastwardly along said right-of-way line to the west right-of-way line of Clifton Avenue; thence eastwardly to a point, said point being the point of intersection of the center line of Clifton Avenue with the center line of West Clifton Avenue; thence southeastwardly with the center line of West Clifton Avenue to the point of intersection with the southwestwardly extension of the northwest parcel line of Parcel 6 Plat Book 95 Page 5 HCAP; thence northeastwardly along said parcel line extended and said parcel line and continuing along the west terminus of Kirk Alley and the northwest parcel line of Parcels 13, 14, 15, 16 and 17 Plat Book 95 Page 5 HCAP to the north corner of said parcel 17; thence southeastwardly along the northeast parcel line of said parcel and said line extended to the center line of Ohio Avenue; thence southwestwardly with the center line to the point of intersection with the center line of West Clifton Avenue; thence southeastwardly with the center line of West Clifton Avenue to the point of intersection with the center line extended of Peete Street; thence

eastwardly and southwardly with said center line extended and said center line to the point of intersection with the center line of Main Street; thence southwardly with the center line of Main Street to the point of intersection with the center line of East Liberty Street; thence eastwardly with the center line of East Liberty Street to the point of intersection with the center line of Reading Road; thence southwestwardly and westwardly with the center line of Reading Road to the point of intersection with the center line of East Central Parkway; thence westwardly with the center line of East Central Parkway to the point of intersection with the center line of Vine Street and the place of beginning.

§ 755-17. Severability.

If it is determined by a proper legal authority that any section or part thereof of this Chapter 755 is unconstitutional or otherwise invalid, the remaining sections and parts thereof shall remain in full force and effect and be unaffected by such determination.

Section 3. This ordinance shall be in force and effect from and after the earliest period allowed by law.

Passed August 7 A.D., 1996

/s/ Roxanne Qualls
Mayor

Attest: /s/ Sandy Sherman
Clerk

I HEREBY CERTIFY THAT ORDINANCE NO. 229 1996 WAS PUBLISHED IN THE CITY BULLETIN IN ACCORDANCE WITH THE CHARTER ON 8-20-96.

/s/ Sandy Sherman
Clerk of Council.

EMERGENCY

City of Cincinnati

An Ordinance No. 304 -1998

EXTENDING the prostitution-exclusion zone designation for the Over-the-Rhine neighborhood described in Chapter 755, Drug-Exclusion Zones for an additional two years and modifying the provisions of Chapter 755 of the Cincinnati Municipal Code by amending Section 755-5, Civil Exclusion to provide for the termination of the 90-day exclusion upon the dismissal of the charges, acquittal of the person excluded, or the failure to prosecute.

WHEREAS, on August 7, 1996, City Council with the enactment of Chapter 755, Drug-Exclusion Zones of the Cincinnati Municipal Code designated the Over-the-Rhine neighborhood as a drug-exclusion zone for an initial period of two years; and

WHEREAS, that initial period of time will expire in the near future, unless pursuant to Section 755-3, City Council by ordinance extends such drug-exclusion zone designation for the Over-the-Rhine neighborhood; and

WHEREAS, the City administration has analyzed the results of the prostitution-exclusion zone legislation and determined that such is an effective crime fighting tool and has recommended the extension of such drug-exclusion zone designation for the Over-the-Rhine neighborhood; and

WHEREAS, Council wishes to provide for the immediate termination of the 90-day exclusion contained in Section 755-5 upon the acquittal or other favorable disposition of the criminal charges against the person excluded; now, therefore,

BE IT ORDAINED by the Council of the City of Cincinnati, State of Ohio:

Section 1. That City Council, pursuant to Section 755-3 of the Cincinnati Municipal Code, hereby extends the designation of the Over-the-Rhine neighborhood as a drug-exclusion zone for an additional two years from and after the effective date of this ordinance.

Section 2. That Section 755-5 of the Cincinnati Municipal Code is hereby amended as follows:

§ 755-5. Civil Exclusion.

A person is subject to exclusion for a period of ninety (90) days from the public streets, sidewalks, and other public ways in all drug-exclusion zones designated in Chapter 755 if that person has been arrested or otherwise taken into custody within any drug-exclusion zone for drug abuse or any drug abuse-related activities including the following crimes:

1. Corrupting another with drugs in violation of Ohio Revised Code Section 2925.02.

2. Trafficking in drugs in violation of Ohio Revised Code Section 2925.03.

3. Drug abuse in violation of Ohio Revised Code Section 2925.11 (except for a minor misdemeanor violation).

4. Possessing drug abuse instruments in violation of Ohio Revised Code Section 2925.12.

5. Drug paraphernalia offenses in violation of Ohio Revised Code Section 2925.14.

6. Illegal processing of drug documents in violation of Ohio Revised Code Section 2925.23.

7. Abusing harmful intoxicants in violation of Ohio Revised Code Section 2925.31.

8. Trafficking in harmful intoxicants in violation of Ohio Revised Code Section 2925.32.

9. Offenses involving counterfeit controlled substances in violation of Ohio Revised Code Section 2925.37.

The aforesaid 90-day exclusion will cease immediately if the person arrested or otherwise taken into custody for the crimes listed above is subsequently acquitted of the charge(s), said charge(s) is/are dismissed, or the charge(s) is/are no longer being pursued by law enforcement.

Additionally, any person arrested or otherwise taken into custody for any crimes listed above who is subsequently convicted thereof in a court of law for the offense is subject to exclusion for a one (1) year period from the date of such conviction from the public streets, sidewalk, and other public ways in all drug-exclusion zones designated in Chapter 755.

If a person excluded from a drug-exclusion zone is found therein during the exclusion period, that person is subject to immediate arrest for criminal trespass pursuant to Ohio Revised Code Section 2911.21, a misdemeanor of the fourth degree.

Section 3. That existing Section 755-5 of the Cincinnati Municipal Code is hereby repealed.

Section 4. That this ordinance is hereby declared to be an emergency measure necessary for the preservation of the public peace, health and safety and shall go into effect forthwith. The reason for said emergency is to extend the

drug-exclusion zone designation for the Over-the-Rhine neighborhood before its expiration.

Passed September 2, 1998

/s/ Roxanne Qualls
Mayor

Attest: Sandy Sherman
Clerk

New wording has been underscored.

I HEREBY CERTIFY THAT ORDINANCE NO. 304 1998 WAS PUBLISHED IN THE CITY BULLETIN IN ACCORDANCE WITH THE CHARTER ON 10-15-98.

/s/ Sandy Sherman
Clerk of Council.

(2)

Supreme Court, U.S.
FILED
MAY 5 2003
OFFICE OF THE CLERK

No. 02-1452

In The

Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

PATRICIA JOHNSON and MICHAEL AU FRANCE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents Patricia Johnson and Michael Au France, Plaintiffs below, submit this Opposition Brief in response to the Petition for a Writ of Certiorari filed by the City of Cincinnati.

Most importantly, there are dispositive jurisdictional reasons for denying *certiorari*. During the pendency of the Sixth Circuit appeal below, the Ohio Supreme Court invalidated the drug exclusion ordinance at issue in this case in a separate proceeding, *State v. Burnett,* 755 N.E.2d 857 (2001), *cert. denied*, 535 U.S. 1034 (2002). Because the Ohio Supreme Court's ruling rested on independent and adequate state law grounds, the ordinance will remain unenforceable regardless of what this Court decides, and any opinion by this Court discussing the federal constitutional claims presented by the petition would be purely advisory. For this reason alone, *certiorari* should be denied.

In addition, none of the many constitutional claims that Petitioner seeks to raise before this Court merit plenary review. Petitioner's principle complaint is that the court below improperly looked beyond the Fourth Amendment when it analyzed the constitutionality of the challenged ordinance, which permitted city officials to bar anyone arrested or convicted of a drug offense within a designated "drug exclusion zone" from reentering that zone for 90 days (after an arrest) or one year (after a conviction).

As described more fully below, the Sixth Circuit ruling is consistent with this Court's prior holdings and does not create any meaningful conflict with the holdings of other

circuits. For this reason, as well, *certiorari* should be denied.

STATEMENT OF THE CASE

This case concerns the constitutionality of a municipal ordinance enacted by the City of Cincinnati in 1996, which created a so-called "drug-exclusion zone" in an area of the city known as "Over-the-Rhine." Under the terms of the ordinance, Chapter 755 of the City's Municipal Code, a person arrested for a drug offense in Over-the-Rhine could be barred from re-entering the neighborhood for 90 days.[1] A person convicted of a drug offense in Over-the-Rhine could be barred from entering the neighborhood for one year. Any violation of an exclusion order subjected the violator to prosecution for criminal trespass.[2]

In 1998, Respondent Patricia Johnson was arrested but never indicted for a marijuana trafficking offense in Over-the-Rhine. As a result of her arrest, she was barred for 90 days from entering the neighborhood where one of her children and five of her grandchildren resided. Respondent Michael Au France is a homeless man who was ultimately barred from entering Over-the Rhine for approximately four years. Because of his exclusion, he could neither visit his attorney's office nor seek shelter

[1] A 1998 amendment to the ordinance clarified that the 90 day exclusion would end upon acquittal, dismissal of charges, or failure to prosecute.

[2] The ordinance provided an exception for individuals who lived or worked in the drug-exclusion zone prior to receiving an exclusion order.

from social service organizations located in the neighborhood.

Respondents brought this lawsuit to challenge the constitutionality of the exclusion ordinance. Both the district court [Pet. App. 71-102] and the court of appeals [Pet. App. 1-70] agreed that the ordinance could not be sustained under the federal constitution.

However, before even reaching the federal constitutional questions, the Sixth Circuit noted that the ordinance had also been struck down by the Ohio Supreme Court on state law grounds following the district court's decision in this case. The Sixth Circuit properly recognized that this state law ruling by the Ohio Supreme Court is binding on the federal courts. [Pet. App. 7-9].[3]

REASONS FOR DENYING THE WRIT

The requested Writ should be denied for two reasons. First, because the decision of the Ohio Supreme Court in *Burnett* creates a fatal jurisdictional defect which precludes review by this Court. Second, because even in the absence of that defect, nothing in the opinion below conflicts with the holdings of this Court, or creates a conflict among the circuits, meriting plenary review.

[3] As the Sixth Circuit also properly recognized, the parties to this case nonetheless have an ongoing case or controversy regarding attorney's fees, [Pet. App. 8-9], but the resolution of that dispute neither requires nor warrants this Court's present intervention.

I. THE OHIO SUPREME COURT HOLDING IN *STATE v. BURNETT* INVALIDATED CHAPTER 755 ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS, THUS PRECLUDING REVIEW BY THIS COURT.

This Court does not review judgments that rest on independent and adequate state law grounds. Nor can the Court render advisory opinions on federal issues when the challenged ordinance has been struck down on state law grounds by an intervening state court decision. *See generally, Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). That is precisely the situation here.

In October 2001, in *State v. Burnett, supra,* the Ohio Supreme Court struck down Chapter 755 as a violation of both state law and the state constitution. The court held that Chapter 755 exceeded the authority granted to cities under Section 3, Article XVIII of the Ohio Constitution. *Id.* at 868. The court further ruled that Chapter 755 conflicted with the Ohio Revised Code by adding a punishment (banishment) not authorized by state statute. *Id.*[4]

As a result of *Burnett,* Chapter 755 is now unenforceable as a matter of state law. A ruling by this Court on the federal constitutional questions presented in the petition for *certiorari* would, therefore, have no practical impact on the future enforcement of the ordinance. Under these

[4] The Ohio Supreme Court also found that Chapter 755 violates the federal constitution, but there is no doubt that its state law rulings provided an entirely independent and adequate basis for invalidating the ordinance.

circumstances, there is no jurisdiction in this Court, and the petition for *certiorari* must be denied for reasons that this Court has frequently explained.

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. at 125-26. *See also Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Michigan v. Long*, 463 U.S. 1032 (1983).

Here, of course, Petitioner is not seeking direct review of the Ohio Supreme Court's state law decision but the principle remains the same. Nothing the Sixth Circuit did, and nothing that this Court can do, will alter the effect of the Ohio Supreme Court's judgment, or resuscitate Chapter 755. Any ruling from this Court on the validity of that ordinance would thus be wholly advisory.

II. THE HOLDING BELOW NEITHER CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT, NOR CREATES A CONFLICT AMONG THE CIRCUITS, MAKING EVEN PLENARY REVIEW UNNEEDED.

The petition for *certiorari* raises a panoply of federal constitutional questions. This Court lacks jurisdiction to review those questions for the reasons stated above.

Moreover, even in the absence of this fatal jurisdictional defect, none of the issues raised by Petitioner would merit plenary review. The key constitutional rulings by the Sixth Circuit below are consistent with this Court's decisions and do not create a meaningful conflict with the decisions of other circuits.

In fact, all but one of the questions presented for review by Petitioner stem from the failure of Cincinnati to convince the courts below that Section 755 should be assessed solely in light of the Fourth Amendment.[5] Both the district court [Pet. App. 80-84] and the Sixth Circuit [Pet. App. 10-14] correctly refused to measure lengthy periods of administratively imposed banishment with the rational-basis yardstick provided by the Fourth Amendment. In this regard, the courts below hardly adopted a novel approach meriting review on *certiorari*. Rather, the lower courts properly rejected an attempt by the Petitioner to expand the concept of "continuing seizure" beyond any recognized precedent.

This Court has never sanctioned a view of continuing seizure as broad as that proposed by Petitioner. Under the approach advanced by Cincinnati, a person excluded under Chapter 755 from Over-the-Rhine, for either ninety days (for persons merely arrested for a list of designated offences) or one year (for those subsequently convicted of those offences), would be considered "seized" by the state for the duration of his exclusion [Pet. App. 80-81], a scheme Cincinnati claims should be subject only to

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[5] Petitioner also raises a double jeopardy question that the court below expressly declined to reach. [Pet. App. 42]

rational basis review. [Cincinnati Pet. 9]. This exceeds in both its duration and its scope any notion of Fourth Amendment seizure heretofore recognized by this or any other federal appellate tribunal.

In *Albright v. Oliver*, 510 U.S. 266 (1994) (plurality), for example, the Court held that the Fourth Amendment, and not substantive due process, governed claims asserted by a man who, after an arrest warrant issued, surrendered to police, and was subsequently deemed to have been "seized" by the Court. *Id.* at 275. In so holding, the Court opined that the Framers had crafted the Fourth Amendment to address "pretrial deprivations of liberty." *Id.* at 274.

In an effort to construct a conflict among the circuits where none exists, Petitioner attempts to contrast the Sixth Circuit holding below with a number of circuit cases analyzing restrictions on freedom of movement under the Fourth Amendment. [Cincinnati Pet. 6-10]. This argument is transparently flawed. Each of the cited cases applies a Fourth Amendment analysis in the context of pretrial restrictions on liberty intended to secure a subsequent court appearance. *Nieves v. McSweeney*, 241 F.3d 46, 55 (1st Cir. 2001) (holding that an effort to characterize conditions of pretrial release as a Fourth Amendment seizure "stretches the accepted meaning" of the term); *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (refusing to extend the concept of Fourth Amendment seizure to cover claims of abuse asserted by pretrial detainees); *Evans v. Bell*, 168 F.3d 856 (5th Cir. 1999) (holding that conditions imposed upon pretrial release, including restrictions on interstate travel and reporting requirements, constituted a Fourth Amendment seizure); *Fontana v. Haskin*, 262 F.3d 871, 879 (9th Cir. 2001) (holding Fourth Amendment

seizure continues after arrest and during transport to police station).

None of these cases conflict with the Sixth Circuit holding below, because each of them addresses pretrial restrictions on liberty, whether by arrest or through the imposition of terms for pretrial release. By contrast, Chapter 755 imposed wholesale restrictions on the freedom to travel in a given area for a fixed duration, all by administrative fiat and not in anticipation of any judicial proceeding, something the circuit court expressly noted below. [Pet. App. 14]. Moreover, nothing in the circuit cases cited by Petitioner supports, even in theory, the notion that a Fourth Amendment seizure can or should be deemed to continue after trial. Chapter 755, by contrast, extended limitations on movement for up to ninety days after an arrestee had left the presence of an arresting officer, even when no charges were pursued. [Pet. App. 108-09]. In short, Chapter 755 is *sui generis*, so unlike the provisions in the cases cited that its invalidation conflicts with none of them.

Likewise, nothing in the Sixth Circuit decision at issue conflicts with the decisions of this Court regarding the outer boundaries of Fourth Amendment seizure. Both *Brower v. County of Inyo*, 489 U.S. 593 (1989), and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), address the distinct question of when and whether a motorist is seized during the conduct of a high speed chase ending in his death. While *Lewis* also stands for the accepted proposition that a substantive due process analysis should not be applied when a Fourth Amendment claim is available, the degree to which Petitioner's characterization of seizure departs from any known precedent makes clear that this is

not a Fourth Amendment case at all. It was that incongruence that properly led the Sixth Circuit to assess Chapter 755 in light of the Due Process Clause. *Cf. Graham v. Connor*, 490 U.S. 386 (1989).

The holding that there is a right to intrastate travel implicit in the concept of ordered liberty is central to the decisions below [Pet. App. 20-25, 90-97]. The concept is neither novel nor in conflict with the prior holdings of this Court. While the Court has not expressly recognized a right to intrastate travel, neither have its decisions foreclosed the recognition of such a right. At least three Justices of this Court have recently opined that local freedom of movement is deeply rooted within our national heritage.

> [T]he freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution.

City of Chicago v. Morales, 527 U.S. 41, 53-54 (1999) (Stevens, J. joined by Souter and Ginsburg, JJ.) (quoting *Williams v. Fears*, 179 U.S. 270, 274 (1900)). In addition to the Sixth Circuit below, the Second Circuit in *King v. New Rochelle Mun. Housing Authority*, 442 F.2d 646, 648 (2d Cir. 1971), and the Third Circuit in *Lutz v. City of York*, 899 F.2d 255, 267-68 (3d Cir. 1990) have expressly recognized

such a right, grounded in the constitutional concept of personal liberty.[6]

Nothing in the decision below with respect to intrastate travel is so novel as to merit plenary review.[7]

Petitioner also contends that *certiorari* should be granted to clarify the degree of constitutional protection that attends grandparental and attorney-client relationships. [Cincinnati Pet. 14-17]. While it is true that both the district court [Pet. App. 84-90] and the Sixth Circuit [Pet. App. 25-32] dealt at some length with the impact of Chapter 755 on associational freedoms, this case presents a poorly framed opportunity for plenary review of those questions. The conclusion that the ordinance burdened these specific relationships was not essential to the holdings below, but rather exemplary of the manifold ways in which Chapter 755 burdened the liberty of the Respondents on a daily basis.

Finally, Petitioner argues that this Court should review the conclusion that Chapter 755 – which imposed an extrajudicial sanction through administrative fiat – violated the constitutional guarantee against double

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[6] *But see Wright v. City of Jackson, Mississippi,* 506 F.2d 900, 902 (5th Cir. 1975) (refusing to find, on the basis of a right to intrastate travel, a "right to commute" in derogation of municipal employment residency requirements.

[7] Petitioner unsuccessfully attempts to create a conflict between the decision below and *Lutz* based on the level of scrutiny applied in each case. The present case involves a total ban on Respondents' ability to travel in an entire urban district. *Lutz,* by contrast, involved a traffic regulation that prohibited cruising on city streets. That distinction is more than sufficient to explain the disparate scrutiny applied by the respective courts.

jeopardy. Such a review is not warranted. First, as noted above, the Sixth Circuit did not ground its opinion on double jeopardy at all, holding that the other defects in Chapter 755 were sufficient to seal its constitutional fate. *See* n.5, *supra.* The district court did find that Chapter 755 violated Respondent Au France's right to be free from double jeopardy. [Pet. App. 63-70]. It did so, however, through the systematic and routine application of the seven part test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). This fact intensive application of accepted precedent does not merit plenary review by this Court.

CONCLUSION

Both because an intervening decision of the Ohio Supreme Court would render any decision by this Court advisory, and because plenary review is unwarranted, the Petition for Certiorari should be denied.

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Respectfully submitted,

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